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The nomination by the president of Rufus W. Peckham of New York, to be Associate Justice of the Supreme Court of the United States, made vacant by the death of Mr. Justice Jackson, has given very general satisfaction. Judge Peckham has since 1886 been one of the judges of the New York Court of Appeals, prior thereto having been on the Supreme bench of that State, in which positions he has attained a reputation as a jurist of marked ability. The respect and regard to which he is entitled is best evidenced by the universal expression of regret on the part of the New York bar that his acceptance of this higher honor will remove him from the position which he has filled so long to his credit and that of his native State.

The Supreme Court of Ohio, in the recent case of Pittsburgh, Ft. W. & C. Ry. Co. v. Martin, has rebuked a favorite method adopted by legislatures of evading the constitutional provision requiring the enactment of general laws relating to cities or forbidding the passage of special enactments applicable to only one city. To override this the legislatures in many States frequently enact laws relating to cities having a population of over a certain number and less than a certain other number, and this is taken as a general law, although there may be only one city having a number of inhabitants between those designated in the act. A late Ohio legislature passed an act providing for the redistricting of "every city of the fourth grade of the second class which had at the last federal census a population not less than 5,550 and not greater than 5,560, or which at any subsequent federal census may have a population of not less than 5,550 and not greater than 5,560." This was making a finer distinction than in the laws usually adopted. The Supreme Court of that State, in the case first mentioned, disposes of this attempt to pass a special law under a false guise in a short opinion containing this sentence: "We discover no reason why cities of the fourth grade of the second class, because at the federal census they had a population of not less than 5,550 and not greater than 5,560, should require exclusive legislation; and the classification of such cities in themselves upon such a basis is, in our judgment, too restrictive, uncertain and illusory, to relieve the act from the constitutional infirmity of not being uniform in its operation throughout the State, but local and special in its character."

We called attention in a recent issue (41 Cent. L. J. 223), to the case of State v. Julow, wherein the Supreme Court of Missouri, declared void a piece of labor legislation, which assumed to prohibit employers from coercing or influencing their servants against membership in labor unions. The opinion in that case maintained the constitutional right of liberty of contract of employment, in like manner as liberty of contract on other subjects.

A more recent Georgia case, Wallace v. Georgia, etc., Ry. Co., 22 S. E. Rep. 579, also in effect upholds liberty of contract of employment. A statute of that State enacted in 1891, required incorporated railroad, express and telegraph companies to give to discharged employees or agents the causes of their removal or discharge, when discharged or removed. The act further provided an arbitrary penalty in the event of a refusal to comply with such law, to be sued for by the party aggrieved. The suit in question was brought by a person who had been chief car inspector of the defendant company, and, upon his discharge, requested a statement of the reasons therefor, which request was not complied with. He demanded judgment for the amount of such penalty. In affirming the action of the trial court dismissing the action, the Supreme Court pronounced the statute void and the penalty unenforceable. No opinion was written, but the Supreme Court held, as appears by an official syllabus of the case, that "the public whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public, but for private information as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced

or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this State by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."

NOTES OF RECENT DECISIONS.

GIFTS—NOTES — DEATH OF MAKER.—The Supreme Court of Pennsylvania decides in *In re* Kern's Estate, that where plaintiff gave her accommodation note to deceased, and was obliged to pay it, the fact that she paid it out of the proceeds of property which deceased had given her absolutely does not affect her right to recover against his estate on a note given her as security, and that a note not under seal, and without consideration, given by one to his child, is not enforceable against his estate, the gift being revoked by his death. An effort was made to sustain the case on the ground of natural love and affection of the maker of the note for his granddaughter; but the court said that "the argument falls into confusion from the indiscriminate use of the terms 'moral obligation' and 'moral consideration.' They are not convertible terms, even if there is any such thing as a moral consideration. Natural love and affection are a good consideration for an executed contract or gift, and in this State a moral obligation is a good consideration for an express promise; but natural love and affection are not a moral obligation in such sense as will support even an express promise to make a gift. 'Natural affection is not a sufficient consideration to support a simple contract.' Byles, Bills (8th Am. Ed.) p. 214. 'A consideration founded on mere love and affection is not sufficient to sustain a suit on a bill or note.' Daniel, Neg. Inst. § 179. It is the nature of a gift to be revocable until executed by delivery, and the authorities are uniform that the delivery of a promissory note or check is not an executed gift of the money, but remains revocable, and will be revoked by the death of the promisor before actual payment. 8 Am. & Eng. Enc. Law, 1320; Daniel, Neg. Inst. §§ 179, 180; Chit. Bills, p. 85; Byles, Bills (15th ed. 1891), p. 144; Wood's Byles, Bills (8th Am. ed. 1891), p. 213."

APPEAL—NOTICE—EVIDENCE OF SERVICE.—In Ward v. Springfield Fire & Marine Ins. Co., it is decided by the Supreme Court of Washington that extrinsic evidence cannot be received by the Supreme Court to show that the notice of appeal which appears from the record to have been served too late, was in fact served within the statutory time. The court cites Elliott on Appellate Pro. § 186, which says that "appeals are tried by the record. The transcript is the source from which appellate tribunals obtain their knowledge of the facts involved in the controversy between the parties before them, as well as the source from which they derive their knowledge of the questions upon which it is their duty to pronounce judgment. * * * The record as embodied in a properly prepared and duly authenticated transcript imports absolute verity, and cannot be aided, varied, or contradicted by extrinsic evidence." See, also, Haynes, New Trials & App. § 283; McDonald v. Bowman (Neb.), 58 N. W. Rep. 704; Carey v. Brown, 58 Cal. 180; *In re* Fifteenth Ave. Extension, 54 Cal. 179; Boyd v. Burrell, 60 Cal. 280. In the last-mentioned case, which is directly in point, the court said: "In denying a rehearing in this cause, we think it proper to say that the transcript shows that the notice of appeal was served on the 18th of December, 1879, and filed on the 30th of January, 1880. An attempt is made to show by affidavit before this court that it was filed at an earlier day, and within the time allowed by law. This cannot be allowed. It was so held in Boston

v. Haynes, 31 Cal. 107. The record of the court below cannot be altered or amended by proof made in this court. If it is incorrect, that must be made to appear by proper evidence to the court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this court to be assailed by evidence of less dignity than a record. See Smith v. Brannan, 13 Cal. 107; Bonds v. Hickman, 29 Cal. 460; Satterlee v. Bliss, 36 Cal. 521. The party must seek relief in the court from which his appeal was prosecuted."

TELEGRAPH COMPANY—LIABILITY FOR ALTERED MESSAGE.—In Shingleur v. West. Union Tel. Co., 18 South. Rep. 425, the Supreme Court of Mississippi considers some interesting questions in the law as to telegraph companies holding that a telegraph company is liable to either the sender or the sendee for damage sustained by reason of the delivery of an altered message to the sender in contract or tort, and to the sendee in tort, and that where plaintiffs telegraphed their correspondents to sell certain cotton at 8 1-2 cents per pound, and the message as delivered read 8 5-16 cents per pound, and the cotton was sold at the latter price by said correspondents, acting for plaintiffs as undisclosed principals, and immediately thereafter advised plaintiffs of the sale, and plaintiffs paid the difference to their correspondents to protect their credit, there being no contract that plaintiffs would deliver cotton when there was a mistake in the telegram, the telegraph company is not liable to plaintiffs for the loss sustained. Cooper, C. J., dissented. The court says:

The first contention of appellee is that the sender does not make the telegraph company his agent in such sense that it renders him liable to the sendee in case an altered message is delivered to the sendee. The negative of this proposition is maintained by the English courts, which hold that the liability of the telegraph company arises out of the contract, and hence that the sendee, not being in privity with the company, can never sue the company. Playford v. Telegraph Co., Allen, Tel. Cas. 437; Henkel v. Pape, *Id.* 567. This view is also urged with great clearness and power in Gray Commun. Tel. §§ 68, 104, *et seq.*, and in Bigelow, Torts, pp. 621-626, but the strongest reasoning in support of this view which we have found in any case, English or American, is in Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. Rep. 783, decided in A. D. 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other unless the telegraph company is the agent of the sendee, and this is repudiated on principle and authority. The English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to-wit, that since the sendee cannot sue the company (as held in Playford's Case, *supra*), nor the sender (as held in Henkel's Case, *supra*), he is remediless. According to what is called the "American Doctrine" (Gray, Commun. Tel. § 104, note 3; Thomp. Elect. § 426), the affirmative of the proposition under discussion is maintained; representative among the cases so holding being Rose's Case, Allen, Tel. Cas. 337, in which case the principal was disclosed, and the agent not bound. In De Rutte v. Telegraph Co., 30 How. Prac. 403, it was held that the party interested in the dispatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In Dryburg's Case, 35 Pa. St. 298, the Supreme Court held that the company was the agent of both sender and sendee (upon very unsatisfactory reasoning), and hence either could sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damages, we find this view clearly and universally upheld by the American authorities. Gray, Commun. Tel. § 78; Thomp. Elec. §§ 427, 428, 430, 448; Dryburg's Case, 35 Pa. St. 298; Sherwood's opinion; Rose's Case, Allen, Tel. Cas. p. 340; Bigelow, Torts, p. 614 *et seq.*; Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. Rep. 783. Rose's Case, in so far as it held that the sendee could not sue in that case because the principal was the injured party, and could himself alone sue, is said by Mr. Gray (section 78) to be open to criticism, and is held unsound on that ground by other authorities. Mr. Thompson suggests in section 424 an additional reason why the sendee should be allowed to sue, and in section 427 puts the matter on the true ground. He says: "The true view which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs,—upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender or his principal, where he is agent, or the receiver or his principal, where he is agent." This is the doctrine of this court in Allen's Case, 66 Miss. 549, 6 South. Rep. 461. This review of the authorities will sufficiently indicate how the courts, in dealing with this purely modern agency, have been groping their way in their search for the true ground of liability, uselessly conjuring up analogies that do not exist, and misled by the apparent applicability of the doctrine of agency as existing between private individuals. This view last above given discards absolutely the doctrine of agency, as applicable between private individuals, as suiting the case of the liability of the telegraph company to sendee or to sender. It treats the telegraph company as an institution *sui generis*, a system unto itself, an independent transmitter of intelligence, an independent contractor, or (as Mr. Bigelow and Judge Sherwood most simply and best put it) as an independent principal. It is liable to the sendee in tort alone, as principal. It is liable to the sendee in contract or in tort, as principal. It is not liable to either as agent

in any proper sense. Telegraph Co. v. Brown (Ind. Sup.), 8 N. E. Rep. 171; Telegraph Co. v. Hope, 11 Ill. App. at page 289, and authorities cited. "Whether the agency is special or general, the authority delegated governs all questions arising between the principal and his agent, out of the agency. Whether the agency is general or special, a principal is responsible to a third person dealing *bona fide* with his agent, where the agent acts within the scope of the authority actually conferred upon him by the principal, or where the agent acts within the scope of the authority which he has been held out by the principal as possessing. But whether the agency is general or special, a principal is not responsible to a third person dealing with his agent, where that agent acts beyond the scope of both these authorities. • • • It is clear that a telegraph company is actually authorized by its employer to communicate a certain message only. It is also clear that it is not held out by him as possessing an authority to communicate any, as distinguished from a certain message." Gray, Commun. Tel. § 105. The delivery, therefore, of an altered message, is the delivery of a message which the company, neither as general or special agent, had, or was held out as having, any authority to deliver; and the liability to the sender is that of an independent principal. It is perfectly obvious that the company is not the servant of the sender; the sender has no authority to control the company, as to the manner in which it does the act. Gray, Commun. Tel. § 104 *et seq.* The steady growth of this view is shown by the statutes of all the States imposing upon the company the duty of receiving and sending messages for all persons, with the various regulating provisions embraced in these statutes; thus making what had been, prior to such statutes, merely the duty imposed by the law from the peculiar nature of the business of telegraphy, after such statutes a statutable public duty. And now we have gone the further and completer step indicated in section 195 of the constitution of 1890; all which enforces the justness of the declaration in Telegraph Co. v. Allen, 66 Miss. 555, 6 South. Rep. 461: "The courts then (in the early history of the English law, dealing with common carriers) as now, conscious of the needs of the public, expounded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

It is also true that the sender may sue the company in tort as well as in contract, in the case of an altered message. Mr. Cooley says: "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party, on the same state of facts." Cooley, Torts, pp. 103, 104. So Mr. Bigelow says: "The fact that a contract existed, and was broken at the same time and by the same act or omission by which the plaintiff's cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties; one of a special character to the party with whom he contracted, and one of a general character to others. • • • The duty, therefore, does not grow out of the contract, but exists before, and independently of it." Again: "What does it mean when it is said that even this contractee (appellant here answering to the contractee) may sue in tort or in contract for his damages? Certainly nothing, unless the original duty, which the defendant before the contract owed to all alike, still survives, even towards his contractee." And without prolonging this opinion on this point, it is sufficient to refer to Bigelow, Tort, pp. 586, 587, 614, and to the elaborate discussion in Rich v. Railroad Co., 87 N. Y. 382. But, whether looked at in the light of contract or of tort, plaintiff's case comes inevitably to this: That plaintiff, at a time when he knew fully of the mistake in the tele gram, and when he could have delivered or refused to deliver the cotton, and when the minds of plaintiff and of Appleton, Dickson & Co. never having met, and there being, as to this sale, no contract made between them, plaintiff was, therefore, under no legal liability to deliver the cotton, nevertheless, acting on the "sentiment" that he would himself protect his agent (already fully protected by the liability in tort of the company to such agent), and maintain his business credit, did not deliver the cotton anyhow, and, having done so, now seeks to hold the company,—can the action be maintained? The only case holding that the action can be maintained, so far as our research has gone, is Telegraph Co. v. Shotter, 71 Ga. 767, 768. The facts in this case are identical with those in Pepper v. Telegraph Co., *supra*, where the court, after an elaborate review of the American authorities, say: "As already stated, Mr. Gray not only shows that upon principle the English holding is correct, but, while listing the cases above cited, as indicating a contrary view, states that most of them are *dicta*. There is but one case referred to by him which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of Telegraph Co. v. Shotter, 71 Ga. 760. With great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion reached. The learned judge places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose all credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraphic system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government. Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message can be affected." So the case of Harrison & Co. v. Telegraph Co., 10 Am. & Eng. Corp. Cas. 600, is a case directly in point, and stronger in its facts for plaintiff than this case. There plaintiffs, in Texas, wired Latham, Alexander & Co., in New York, to purchase 100 bales of cotton. As delivered, the telegram directed them to sell 100 bales. Latham, Alexander & Co. sold, without plaintiff's knowing anything of the error, and a loss resulted of $129.50, which later, on settlement with Latham, Alexander & Co., plaintiffs paid, claiming they were compelled to pay. The court say: "The mistake which occasioned the loss was a mistake of the telegraph company, and not of the plaintiffs, and they (plaintiffs) were not bound to pay, or make good said loss to Latham, Alexander & Co.; and, if they made such payment, were not responsible or liable therefor. They could not hold the company liable over to them for repayment." This, too, in a case where the loss had been sustained without knowledge on plaintiff's part of the error. To the same effect are Henkel v. Pape, Allen, Tel. Cas. 567, and Verdin v. Robertson, *Id.* 697. It is not necessary to go so far, and we

express no opinion as to what would be the law had plaintiff here not known, before he acted, all about the mistake. In Pepper's Case and Shotter's Case the goods had been shipped to the place of residence of the sendee, and loss to some extent was inevitable to the sendee. As held in Pepper's Case, it was the plaintiff's duty, in view of all the circumstances, to make the loss as small as possible, and that he could then recover for such loss, as being himself to that extent—a loss thus legally sustained—the injured party. Mr. Gray correctly remarks (Commun. Tel. p. 185, note 11) that Shotter's Case put the liability upon a "moral, and not a legal ground." Here appellant had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract he had never made, and remit Appleton, Dickson & Co. to their adequate remedy against the company. His payment was voluntarily and gratuitous, and cannot, on any sound or just principle, create for him a cause of action where none existed prior to such voluntary payment.

IS A CAUSE OF ACTION FOR A STATUTORY PENALTY ASSIGNABLE?

§ 1. *Qui Tam and Penal Actions.*—Many statutes which prescribe a penalty for particular offenses, or for the omission of some public duty, go further and provide that the penalty, or some portion of it, shall be recovered in a civil action by the informer or the person aggrieved. Such provisions are usually directed against common carriers, telegraph and telephone companies, and such instrumentalities for the performance of duties to the general public, and such actions are so frequent in our courts that it becomes of some importance to know whether or not the cause of action of the informer or person aggrieved, in such cases is assignable. Or, in other words, will it survive to his personal representative in case of his death? While no case has been found precisely in point, I think the question must, on principle and authority, be answered in the negative. Such a right of action clearly arises *ex delicto;* it is the result of a tort or public wrong; there is no element of contract in it. Now, while the rule of the common law that actions *ex delicto* do not survive, has been considerably modified by later statutes and decisions, the relaxation has never extended to such cases as these. Moreover, such assignments would seem to be within the policy of the law as expressed in the rule against champerty and maintenance. The general principles on these subjects, both at law and in equity, are well settled.

§ 2. *Rule as to Survivals at Common Law.*—At common law the rule is plain. A right of action *ex contractu* upon the death of either party survives to or against the personal representative of the party deceased. But where the action is *ex delicto* the rule is otherwise, and the maxim *actio personalis moritur cum persona* applies. At common law no action for a tort survived the death either of him who inflicted, or of him who suffered it. "No action," said Lord Mansfield, where the form of action must be *quare vi et armis et contra pacem*, or where the plea must be that the testator was not guilty, could lie against the executor; upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."[1] So an action would not lie for the personal representative. Executors and administrators are the representatives of the temporal property; that is, the debts and goods of the deceased, but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate.[2]

§ 3. *Rule as to Assignments.*—Moreover, in equity and law an assignment which violates the policy of the law against champerty or maintenance, as operating merely to procure and promote litigation, will be held void as against public policy, even though it may not strictly amount to the criminal offense of champerty or maintenance.[3] Said the Supreme Court of Michigan: "The general doctrine, both in law and in equity, has always been that nothing is assignable that does not directly or indirectly involve a right of property. It has been held repeatedly in this State that equity will not enforce the demands of an assignee of a right to sue for fraud when the cause of action is confined to that."[4] Again, as stated by the English Court of Equity: "The right to complain of a fraud is not a marketable commodity."[5]

§ 4. *Common Law Rule Applied to Ac-*

[1] Cowp. 375.

[2] Chamberlain v. Williamson, 2 Maule & S. , cited with approval in Ward v. Blackwood, 41 Ark. 298.

[3] Pomeroy Eq. Jur., §1276; 2 Story Eq. Jur., § 1040b; 1 Am. & Eng. Ency., p. 833, tit. "Assignments."

[4] Dayton v. Fargo, 45 Mich. 153. See to the same effect Illinois Land & L. Co. v. Speyer (Ill.), 27 N. E. Rep. 931; Bailor v. Dailey, 7 Mackey, 175.

[5] De Hoghton v. Money, L. R. 2 Ch. 169. See also Milwaukee, etc. R. Co. v. Milwaukee & Western R. Co., 20 Wis. 183; Smith v. Thompson, 54 N. W. Rep. 168, 94 Mich. 381.

tions for Statutory Penalties.—It is well established that, at common law, actions on penal statutes do not survive.[6] The federal courts, when in the exercise of their common law jurisdiction, that is, in cases where the penalty or for forfeiture is imposed by an act of congress rather than by a State statute, have enforced this rule of the common law. Thus in Schreiber v. Sharpless[7] the suit was for certain penalties and forfeitures, under a statute[8] for the infringement of a copyright. The defendant died before issue was joined. The plaintiff sought by writ of *scire facias* to bring in the executor of defendant's will, claiming the right to do so under a State statute. The court held that the question of survival is not a question of procedure, but depends upon the substance of the cause of action; that, as the suit was not for the damages which plaintiff had sustained by the infringement, but for penalties and forfeitures recoverable under the act of congress for a violation of the copyright law, the question of survival is not affected by the State law, but is governed by the common law in the absence of a federal statute, and the court held that the action did not survive. It may be noted that of the penalties imposed by that statute,[9] one-half went to the proprietor of the copyright and one-half to the use of the United States. In United States v. De Goer,[10] the District Court for the Southern District of New York (Brown, J.), in an action for the forfeiture of the value of an importation of gloves for fraudulent undervaluation, held that the act,[11] though partly remedial, was mainly punitive and in that case highly penal, because the loss is out of all proportion to the pecuniary loss incurred by the government; that the action for forfeiture, not being divisible as respects the actual pecuniary loss to the government, was subject to the general rule and abated by the defendant's death.

§ 5. *Is the Common Law Rule Affected by Statute.*—Such being the common law rule as to the survival of causes of action *ex contractu* and *ex delicto* respectively, and such the application of the rule, at common law, to actions to recover statutory penalties, it remains to be considered how far, in such cases, the common law has been modified by the statute as to the survival of actions. In many of the States statutes have been passed enlarging the common law rule as to the survival of actions. Thus, in Arkansas, it is provided that an "action for wrongs done to the person or property of another," may be maintained by or against the executor or administrator of either party respectively.[12] Will such a statute authorize the survival of an action to recover a statutory penalty? As we have said, the point is not precisely decided. The Arkansas court, however, has held that the section does not apply to actions for malicious prosecution. In Ward v. Blackwood,[13] the court says: "The language of the statute includes every action, the substantial character of which is a bodily injury, a damage of physical character, but does not extend to torts which do not directly affect the person but only the feelings or reputation, such as malicious prosecution."[14] In Davis v. Railway Co.,[15] the same court said of this statute, that the action preserved thereby is "for the loss sustained by the estate, and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of decedent's creditors if there are any." In another case, it was held that an action for death by a wrongful act survives the death of the wrongdoer, but the action for the benefit of the widow or next of kin abates on the wrongdoer's death. The court says that the statute does not purport to create a new cause of action or liability, but to devolve an existing common law right or liability on the administrator; that to that extent it abolished the common law; that the injury to the person mentioned in the provision must be construed to mean a bodily injury of a physical character and no other,[16] while the injury to the property mentioned in the section so far as it relates to personal property, is such only as was contemplated by the statute of 4 Edward III., ch. 7, on the same subject.[17]

[6] B. 15, Comyn's Dig. tit. Administration.
[7] 110 U. S. 76.
[8] Rev. Stat. U. S., § 4965.
[9] Rev. Stat. U. S., § 4965.
[10] 38 Fed. Rep. 80.
[11] Act of 1779, 1 Stat. L. 677.
[12] Sand. & H. Dig., § 5908; Mansf. Dig., § 5223.
[13] 41 Ark. 298.
[14] Citing Smith v. Sherman, 4 Cush. 408; Nettleton v. Dinehart, 5 Cush. 543; Norton v. Sewall, 106 Mass. 143.
[15] 53 Ark. 126.
[16] Citing Ward v. Blackwood, 41 Ark. 295.
[17] Davis v. Nichols, 54 Ark. 358, citing and relying

The language of this old statute shows clearly that the actions which were by it preserved to the personal representative, were limited to those arising out of wrongs to the property of the decedent. It is as follows: "Whereas, in times past executors have not had actions for a trespass done to their testators as of goods and chattels of the same testators carried away in their life, and, so, such trespasses have hitherto remained unpunished, it is enacted that the executors in such cases shall have an action against the trespassers and recover their damages in like manner, as they, whose executors they be, should have had if they were in life." Clearly this statute cannot be held to provide for the survival of the right of action for a statutory penalty.

§ 6. *Such Penalties not Liquidated Damages.*—There is no element of property in the right to sue for a statutory penalty, nor can the action be regarded as *ex contractu* in any sense. Such enactments are not intended to fix liquidated damages, as a compensation to the person wronged, but rather to prescribe a punishment of the wrongdoer that may have the effect of deterring others from like offenses. The Arkansas court, in discussing cumulation of penalties for overcharges on the part of carrier of passengers, said that "the act was not intended to provide a compensation for the injured passenger; but to deter the railroad companies from taking excessive fares by punishing every such act. Each overcharge is a violation of law, and every payment of it is a legal wrong to the party making it, who is thereby aggrieved within the meaning of the act, and by its express terms entitled to sue."[18] Again, in Baltimore, etc. Tel. Co. v. Lovejoy,[19] where the suit was against a telegraph company to recover the statutory penalty for the non-delivery of the message,[20] it was held that the action was for a statutory penalty and not *ex contractu*, and was not within the jurisdiction of a justice of the peace; that though the suit in such cases be in the form of an action of debt, yet "debt for a statutory penalty, while it was in form *ex contractu*, was in reality founded upon a tort."[21] A like interpretation has been put upon similar statutes in other States. Thus, in Virginia, in West. Union Tel. Co. v. Bright,[22] a suit to recover a penalty of $100 for failure to deliver a telegram is distinguished from "any action on contract" as being a proceeding founded, not upon contract but upon tort, *i. e.*, a wrongful violation of a public duty. It is true an action of debt lies for a statutory penalty, but this is because the sum demanded is certain, and not because the cause of action arises *ex contractu*.[23] Again, in Western Union Tel. Co. v. Pettyjohn,[24] the same court, under a provision of the Code,[25] limiting the jurisdiction of a justice of the peace to any claim for a fine, if the amount thereof does not exceed $20, and to other claims where the amount does not exceed $100, it was held that a justice has no jurisdiction to enforce the $100 penalty imposed by the above quoted statute upon telegraph companies for failure to deliver a dispatch, since such penalty is a fine within the meaning of the statute. In Indiana, there is a statute imposing a penalty of $100 on telegraph companies for failure to transmit messages with impartiality and good faith, and in the order in which they are received, to be recovered by the person whose dispatch is postponed or neglected. It has been repeatedly held that this is a penal statute, and does not award liquidated damages. Said Elliott, J., in Western Union Tel. Co. v. Pendleton:[26] "No question of the right to damage is involved; the single question is as to the right to recover a statutory penalty. Counsel are in error in asserting that there is a conflict in our cases upon this subject; from first to last it has been steadily held that the statute is a penal one awarding not liquidated damages but a penalty. It is also decided by these cases that the foundation of the right is the contract with the corporation, but in none of them is it intimated that the recovery is for damages for a breach of contract; on the contrary, all our decisions affirm that the recovery is for a penalty given by statute to a private individual."[27] Again, it

upon Russel v. Sunbury, 37 Ohio St. 372; Witters v. Foster, 26 Fed. Rep. 737.

18 Railroad Co. v. Gill, 54 Ark. 106.

19 48 Ark. 301.

20 Mansf. Dig., § 6410.

21 See also Bagley v. Shoppach, 43 Ark. 375.

22 20 S. E. Rep. 147.

23 Chaffee v. United States, 18 Wall. 516.

24 88 Va. 296, 13 S. E. Rep. 451.

25 Code Va., § 2939.

26 95 Ind. 12.

27 See also Carnahan v. West. Union Tel. Co., 89 Ind. 527; West. Union Tel. Co. v. Adams, 87 Ind. 598; West. Union Tel. Co. v. Gongar, 84 Ind. 176; West. Union Tel. Co. v. Hamilton, 57 Ind. 181: West. Union Tel. Co. v. Buchanan, 35 Ind. 436.

is said: "The statute is a highly penal one, and we cannot extend its operation by a liberal construction."[28] In California a statute similar to that of Indiana, except that the penalty is $500 instead of $100 to be recovered by the sender, was construed in Thurn v. Alta Tel. Co.,[29] and it was said: "The sum to be recovered is a penalty for this breach of duty (*i. e.*, the failure to transmit the message), and the act in this section is a penal law, and is to be strictly construed."[30] The legal characteristics of a penal statute are admirably stated by the California court as follows: "A penal statute is one that imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong that concerns the good of the public, and is commanded or prohibited by law. The law generally first prescribes what shall or what shall not be done, and then declares the penalty. Its primary object is punishment and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action.[31]

§ 7. *Conclusion.*—Finally, it would seem to be clear, beyond question, that a statute prescribing a penalty for the commission of some offense, or the omission of some duty, is a penal statute, notwithstanding a provision that a portion or all of the penalty may be recovered in a suit, civil in form, by the informer, or "person aggrieved;" that such penalty is a punishment for a public tort, and not liquidated damages in compensation of a private injury; that, therefore, the cause of action given by such a statute arises *ex delicto* and not *ex contractu*, though the wrong which constitutes the gravamen of the offense is in itself a breach of contract; that being *ex delicto*, such cause of action is not assignable, and does not survive under the principles of the common law; and that since it does not arise from injuries either to the person or property of the plaintiff, it is not within the statutes on the survival of causes of action. WILLIAM L. MURFREE, JR.

[28] Rogers v. West. Union Tel. Co., 78 Ind. 169, citing West. Union Tel. Co. v. Axtell, 69 Ind. 199.

[29] 15 Cal. 472.

[30] Citing Russell v. Lby., 13 Ala. 131; Batchelder v. Kelly, 10 N. H. 436.

[31] Citing Reed v. Northfield, 13 Pick. 94; Suffolk Bk. v. Worcester Bk., 5 Pick. 106; Frohock v. Pattee, 38 Me. 103; Bayard v. Smith, 17 Wend. 88; Sedg. Stat. & Const. L. 333 *et seq.*

CONDITIONS SUBSEQUENT — SUPPORT — OCCUPANCY OF LAND.

RINGROSE V. RINGROSE.

Supreme Court of Pennsylvania, October 7, 1895.

A deed, wherein the consideration is the support and maintenance of the grantor on the land conveyed, inasmuch as it provides for an occupancy of the land, contains a condition subsequent, which may be enforced against any one into whose ownership the land may pass.

GREEN, J.: The deed from Roger Ringrose and his wife, the present plaintiff, to Michael Ringrose, dated March 28, 1874, was for three tracts of land, one of which, known as the "Homestead Farm," containing 100 acres, is the subject of the present action of ejectment. A nominal consideration of $3,000, which was never paid, or intended to be paid, was recited in the deed; but in the body of the deed, and immediately following the description of the lands, appears the following recital: "The above-described land and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother, Roger Ringrose and Mary Ringrose, his wife, to do well and sufficiently maintain, support, and keep the said Roger and Mary Ringrose, his father and mother, during their natural lives, or the survivor of them, with good and sufficient meat, drink, apparel, washing, and lodging, use and occupancy of the dwelling where they now reside, and medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times, as they may wish to go, and to furnish to each and either of them the sum of $25 per year during their natural lives, and also to pay to Mary O'Neil $250, and to Bridget Ringrose $250, at the death of the said Roger Ringrose and Mary Ringrose, his wife, and not before." It is apparent at once that the true and only consideration of the conveyance was the performance by Michael Ringrose of the stipulations expressed in the foregoing recital. The expression of the obligation of the grantee is peculiar, but perfectly clear: "The above-described land and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother," etc.; that is, the land is conveyed because of, or in consideration of, the agreement of the grantee to do the several things next expressed. Of course, the performance is to take place in the future. The question arising in this case is whether the provision in favor of the grantors is a charge upon the land which will follow it into the hands of subsequent purchasers, whether at judicial or private sales. Being embodied in the deed, it is notice to all purchasers claiming by subsequent conveyances. If the agreement for support and maintenance was a mere personal covenant of the grantee, unaccompanied by any provision for the permanent occupancy by the

grantors of any part of the land conveyed, it would not be a charge upon the land. This was the case in Krebs v. Stroub, 116 Pa. St. 405, 9 Atl. Rep. 469, where the contract, while it contemplated the event of a residence on the land at the mere will of the grantors, made no provision for it, conferred no such right upon the grantors, and it was not reserved by them, expressly or otherwise. The deed was absolute to the grantee, who executed a bond independently of the deed, the condition of which alone expressed the things he was to do. But in this case the deed itself provides in favor of the grantors for the "lodging, use, and occupancy of the dwelling where they now reside," and it was to continue during their natural lives. As all the services which were to be rendered to the grantors were personal to them, they were necessarily to be rendered to them as occupants of the house on the homestead where they then, and for many years before, had resided. In the case of Rohn v. Odenwelder, 162 Pa. St. 346, 29 Atl. Rep. 899, where a similar provision was contained in the deed, we held that it created a charge on the land as to all the provisions. We said: "Immediately after the provision for the widow is a direction that both husband and wife, grantors in the deed, shall have the right and privilege to occupy three rooms of the house during their joint lives and the life of the survivor. As this is a palpable charge upon the title, into whosesoever hands it might fall, it is entirely consistent with the idea that the grantors intended to have the security of the land for all the reservations in the deed in their favor." It is true that the words of the grant in that case contained at the beginning the expression, "under and subject, nevertheless to the payment of the sum," etc., and those words were held to create a charge on the land, although they were annexed simply to a direction to pay money. But the provision for the occupancy of part of the house also created such a charge, and it carried with it all the provisions in favor of the grantors.

In the case of Wusthoff v. Dracourt, 3 Watts, 240, we held that a devise of a house to one Henrietta Miller for life, with remainder in fee to her children, "reserving, however, two of the rooms of said house for the use and during the life of the widow, Mary Wusthoff, mother of said Henrietta Miller, and wife of Julian Dracourt. I desire by this fourth article that the widow Wusthoff may have the choice of those two rooms which shall the best suit her, because I desire that the said widow, Mary Wusthoff, should be sure of a shelter, home, during the time she may have to live,"—created an estate for life in the widow Wusthoff in the two rooms, of which she might make any disposition, and that it did not create a mere easement for her personal use. The widow Wusthoff selected the two most valuable rooms in the house, and, instead of occupying them herself, leased them to a stranger for a money rent, which she received and retained for her own use. We held that she was at liberty to do this, although her daughter, the devisee of the whole house for life, was obliged to pay the taxes and ground rent, because the widow's interest was an estate for life in the two rooms. In the present case it is not necessary to go so far. Here the right to lodge, and the use and occupancy of the whole house, was preserved to the grantor and his wife during their joint lives and the life of the survivor. As a matter of course, this right could not be enjoyed without having and exercising possession of the house, and the interest of the grantors in the house was beyond all question a life estate in both. Said Rogers, J., in Wusthoff v. Dracourt, "The devise of the use of a thing is a devise of the thing itself."

In the case of Bear v. Whisler, 7 Watts, 144, the grantor, Philip Hartman, made an agreement with Jacob Angney, by which he sold and conveyed to Angney a certain tract of land containing 125 acres, "for and in consideration of the said Jacob Angney, his heirs, executors, administrators, or assigns, or either of them, faithfully discharging the following covenants and agreements, to-wit: The said Jacob Angney shall pay six certain obligations of $80 each;" and, further, that "said Jacob Angney shall and will grant and provide for said Philip Hartman and Elizabeth, his wife, during their natural lives, the privilege to occupy that part of the dwelling house which they now live in, and provide" them with flour, firewood, a cow, hay, and pasture, two pigs, etc. An ordinary deed in fee simple was afterwards made, conveying the title to Angney, with a recital at the end of the attesting clause that it was made subject to the conditions and obligations of the agreement. The grantee not having performed all the terms of the agreement, and the land being sold away from him at a sheriff's sale, an action of ejectment was brought by the heirs of Hartman, the grantor, against an alienee of the purchaser at sheriff's sale to enforce the payment of the money obligations mentioned in the agreement. We held that the terms of the agreement could be enforced as by the grant of an estate upon conditions, and upon that subject we said (Rogers, J.): "Whether this was an estate on condition depends on the intention of the parties indicated by the agreement and the deed, which must be taken as one instrument. The principal object of the contracting parties was to provide a comfortable provision for the grantor and his family. If the intention is clear, and is expressed by apt words, why should the vendor be restrained to the remedy by the action of covenant? If the vendee had altogether failed in the performance of his agreement as to the vendor, would it have been an adequate remedy to the vendor to give him an action of covenant? It is manifest it would not. Would he not have been entitled to recover the possession of the premises, in such a case, by action of ejectment? But if the vendor would himself have been entitled to this remedy, I cannot perceive why the present plaintiffs are debarred from it, particu-

larly as the object is merely, in this form of action, to enforce the performance of the agreement in good faith. The provisions of the deed equally apply to the recipients of the money as to the vendor himself. But, furthermore, it is apparent from the face of the deed that something remains yet to be done by the vendee before his title is perfect, and that so far he may be viewed in the light of a trustee in equity for the vendor, notwithstanding the legal title has been conveyed. Of this the purchaser at the sheriff's sale had notice, because it is spread upon the face of the title under which he claims. We must look to the substance of the agreement, and not to the form. * * * So a purchaser at sheriff's sale takes the land subject to the payment of purchase money, which appears on the face of the deed to remain unpaid, and of which he has notice." The whole of this reasoning is directly applicable to the facts of the present case. In Bear v. Whisler the conveyance was absolute without any condition on its face, but by a brief reference to the agreement subject to which the conveyance was made all the stipulations of the agreement were imported into the deed with the same effect as if they had been written in the deed. The word "subject" merely gave notice of the conditions and obligations of the agreement, but the agreement itself did not contain that word, or any other equivalent word or expression operating as a condition or restraint upon the effective words of the conveyance, except as such a consequence was derived from the terms of the agreement itself; hence the whole force of the reasoning of the opinion of this court was based upon the inquiry, what was the intention of the parties? In the present case the words of the agreement of the parties are incorporated into the deed, and are a part of it; and they need no words of reference or condition in another instrument to bring them within the operation of the deed. Being in the deed in this case, they have the same operative effect as was given to them in Bear v. Whisler after they were brought into the deed by the subjecting and conditional reference in the deed. The question, then, what was the intention of the parties as to the estate? being upon condition, the solution is perfectly simple. The deed expressly declares that the lands are conveyed to the grantee "by his agreeing to support his father and mother," etc.; that is, because he agrees to support them, for that reason, and upon that consideration, they have made the conveyance. The cause and reason of the conveyance are more effectively and directly expressed in these words than by the words "under and subject," or "upon condition;" for the obligatory words immediately follow the words of conveyance and description, and the connecting words, "by his agreeing to support his father and mother." In other words, A conveys land to B. B thereby agrees to support the grantor, and B takes his title clogged with this expression of the purpose of the conveyance to him. It is conceded that if the deed had contained the words "subject to the support," etc., or "on condition of the support," etc., those words would have created a condition which would have fastened on the title. Why? Manifestly because such was the intention of the parties. But such intention is not specifically declared by such words. It is inferred, because the purpose of support is implied from the words "subject to," or "on condition of" support. But that purpose is more directly expressed when the deed declares that "the above-described land, and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother." It is true, more words are used, but they are more expressive of the very purpose and intent of the conveyance.

There are, however, other reasons quite as forcible as the above, establishing the same intent. The "use and occupancy of the building where they now reside" necessarily imports the retention of the possession of part of the premises granted for the purpose of receiving the support and maintenance provided for, and these words, as we have seen, create an estate in the land which belongs to the grantors. If it belongs to the grantors, it never passed to the grantee, and hence affects his title through all its subsequent movements. The other stipulations are also such as to indicate clearly that they were to be performed on the land. Thus the grantors are to be supplied, while occupying a house on the land, with "good and sufficient meat, drink, apparel, washing, and lodging," also "medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times as they may wish to go." It is simply incredible that it ever entered into the minds of either of the parties that such services as these were to be rendered at any other place than on the land itself. At any other place they would be an intolerable and costly burden, which would practically destroy the value of the grant.

In the case of Ogden v. Brown, 33 Pa. St. 247, the words of the instrument were a present grant of title to the grantee "in the consideration that the said Stephen Wilcox deliver unto me, the said Amy Cranmer, one-third of all the produce of all kinds whatsoever,—grain to be delivered in the half bushel, and hay in the barn,—during my natural life; then the said Stephen to have free and peaceable possession, clear of all incumbrances except the lord of the soil." We held this to be an executory contract, under which the fee passed to Stephen Wilcox on the death of his mother, although there were no words of inheritance in the deed, simply because such was the intention of the parties. In the opinion by Strong, J., he said: "The purpose of the instrument was so evidently to make provision for Mrs. Cranmer, while she should live, that it can hardly be presumed her intention was to part with her interest irrevocably, without effectuating her pur-

pose." We cite the case as an illustrative instance in which the legal effect of the instrument was made to depend upon an interpretation of the intent of the parties, and that intent was chiefly worked out by the consideration that the grantor meant to have support during her life as a result of the grant. We think the same line of reasoning affects the interpretation of the instrument we are considering. It is entirely conclusive that Roger and Mary Ringrose intended to have their support from their son, Michael, during the whole of the remainder of their lives, as a result and as the reason for their conveyance of the title. The consideration could never be paid until the death of both of them, and an actual residence on the land during the entire period was specifically provided as a part of the consideration of the conveyance.

In construing a similar instrument in Shirley v. Shirley, 59 Pa. St. 267, Thompson, C. J., said: "Courts, in my opinion, should be slow to give the effect of absolute conveyances to instruments for provisions made between parents and children of the kind of which we are speaking, unless the intention be very clear. Such agreements are usually fruitful sources of strife, litigation, and very often of great wrong to aged and feeble parents; and, when held to be absolute conveyances, it puts them entirely at the mercy, sometimes of unwilling, and often unkind, offspring." There could be no more forcible or pointed illustration than is afforded by the facts of the present case of the justice and humanity of the foregoing comments. The venerable plaintiff is now almost 90 years of age, entirely helpless to earn any present support, and dependent upon the provision in her deed to her son for the very means of existence. Her son is dead. Her husband died before him, and she is left alone to maintain a struggle for her life with her own daughter-in-law, who has obtained the title to the land through proceedings in the orphans' court. It is matter of much satisfaction that we are not obliged to hold that the conveyance by which she granted the land in question to her son was an absolute deed, free of all conditions or restraints, and that we are at liberty to decide, as we do, that the land and its owners must perform the service, and render the tribute, because and on account of which the plaintiff, still maintaining by a legally reserved right an actual residence on the land, was induced to and did part with all the rest of her title. The condition upon which she granted the title has not yet been fully performed, and cannot be until her death; and until it has been fully performed the title of the grantee and his successors has not become complete.

The case of Driesbach v. Serfass, 126 Pa. St. 32, 17 Atl. Rep. 513, affords another instance in which the foregoing considerations were applied and enforced in the construction of an instrument quite similar to the present. There the grantor, over 70 years of age, and childless, conveyed by a deed the fee-simple title to a tract of 50 acres of land to his niece, who was a married woman. The consideration recited in the deed was one dollar, and "other good and valid considerations in law hereinafter mentioned, and to be strictly kept by the said Sally Ann Serfass." These considerations appeared in a clause following the description of the land, thus: "Excepting, nevertheless, the residence of the said Peter Berger, the grantor hereof, of the first part, in the house and on the premises, during his natural life, until the death and burial of the said Peter Berger; and I, the said Sally Ann Serfass, the grantee in the aforesaid premises, do hereby bind myself, my heirs, etc., to find good house room and sleeping and lodging apartments for the convenience of the said Peter Berger during his life, and to find good and sufficient board, lodging, meat, drink, clothing, and nursing, medical attendance, and all other necessaries for him during his life, and a decent burial for him, etc.; all of which is to be and remain a lien upon the premises aforesaid until the whole of the duties aforesaid are performed," etc. Sally Ann Serfass and her husband entered upon the premises, and performed the services until she died. Then her husband engaged one Driesbach to go into possession and take care of the grantor, Berger, until his death, and surrendered the possession to Driesbach. Afterwards Berger made an absolute deed of the premises to Driesbach for five dollars, and, later, died. After his death, Driesbach refused to surrender the possession to Serfass, who thereupon brought ejectment to recover the land. We held that the deed to Sally Ann Serfass was not in the nature of a will, nor yet an absolute deed, but merely an executory contract vesting an equitable estate in the grantee; the legal title remaining in the grantor during his lifetime. We held also that there could be no recovery in ejectment by the heirs of the original grantee in the absence of evidence that the covenants in the deed on the part of the grantee had been performed by the grantee or her representatives. There was no reservation of any part of the premises, but the right of residence in the house and on the land was excepted, and it was also declared that the grantor's right to the services of the grantee should be a lien on the land. The determination of the case was not upon the fact of the exception as to residence, nor upon the language declaring the grantor's rights under the deed to be a lien, but upon the intention and meaning of the parties. Thus our Brother Williams, delivering the opinion, said: "We have seen that the object of the transaction was to secure the continued performance of such services as his age and condition might render necessary. It is important to remember also that this was an arrangement between near relatives, and that the services of the niece are stated to be the consideration which she pays and is to pay for the property of her uncle. He is to have the right to live in the house, to remain in possession; and she is also to take possession, and live in the same

house, in order to fulfill her agreement. * * * It is equally clear that the exceptions and covenants were intended to protect the grantor against the words importing a present grant. That such words do not necessarily pass a present fee has been repeatedly held. The whole instrument, and the nature and object of the transaction, must be considered. In Williams v. Bentley, 27 Pa. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument the intention appears to be otherwise. * * * The right of Serfass to recover possession in this action depended upon whether the consideration agreed upon had been paid. * * * It would be contrary to the original intentions of the parties, as well as against good conscience, to permit the vendee to recover the possession of the land from his vendor, or one holding his title, without rendering, or offering to render, the equivalent contracted for." Every word of these comments is directly applicable to this case. That it was the intention of these parties that the services were to be rendered in consideration of the conveyance is too plain for argument. That it would be a gross injustice to permit the grantee, or one claiming under him, to retain the land without performing the service, is equally clear. And, no matter how strong the words of present grant in the deed are, if the intention was that the title should not pass entirely except upon the complete performance of the service stipulated for in the deed, then it does not pass. Such are all these authorities, and by them this case is governed. We are clearly of opinion that the plaintiff was entitled to an unqualified affirmance of her first, second, and third points, and we therefore sustain the first three assignments of error. We sustain the fifth assignment, and think the instruction should have been to find for the plaintiff. We think, if Michael Ringrose accepted the deed of February 8, 1881, it was evidence to show the construction given to the deed of March 28, 1874, by all the parties, and should therefore have been received in evidence, and we therefore sustain the sixth assignment. For the purpose of showing the knowledge of the second deed by the defendant, we think that deed should have been received in evidence, with the other facts offered under the seventh assignment, and we therefore sustain that assignment. For a similar reason we sustain the tenth assignment. We do not sustain the fourth, eighth, and ninth assignments. Judgment reversed, and new venire awarded.

NOTE.—In construing a deed the court seeks to give effect to the real intention of the parties as such intention may be gathered from the language of the whole instrument by following out the object and spirit of the deed. Goodpaster v. Leathers, 123 Ind. 121; Studdard v. Wells, 120 Mo. 25; Richter v. Richter, 111 Ind. 456. It is not necessary to use any particular set of technical words in a deed. Bank of Suisun v. Stark, 106 Cal. 202.

Conditions subsequent are not favored in law, because they have the effect in case of a breach, to defeat vested estates. Studdard v. Wells, *supra*. It is a universal rule, that a deed creating a forfeiture will be strictly construed. Ritchie v. Kansas, etc. R. R. (Kan. Mar. 1895), 39 Pac. Rep. 718. Courts will construe clauses in deeds as covenants rather than conditions, if they can reasonably do so, and require forfeitures to be created in express terms or by clear implication. Studdard v. Wells, *supra*. Yet they are not at liberty to ignore the settled legal significance of the language used. Adams v. Valentine, 33 Fed. Rep. 1. It is not necessary that the condition be found fully expressed in one deed, for the rule prevails here as in other matters, that deeds or contracts executed at one time, relating to the same subject, are construed together as one deed. Stanton v. Allen, 32 S. C. 587; Richter v. Richter, 111 Ind. 456; Ritchie v. Kansas, etc. R. R., *supra;* Norton v. Perkins (Vt. Dec. 1894), 31 Atl. Rep. 148. Where A conveyed his land to his son, providing for his own support by his son, it was held, that if it appeared the intention was that the estate should be held and enjoyed by the son on condition, that he performed the acts specified, then the estate is held upon condition subsequent. Especially is this the rule, when the grantee has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. In such a case a condition subsequent arises by clear implication. Richter v. Richter, 111 Ind. 456. Estates have frequently been conveyed on condition that the grantee should maintain the grantor during his natural life, and such deeds have been sustained as estates on condition subsequent, and liable to forfeiture for breach of contract, as: a deed conveying land in consideration of the grantee's agreement to support the grantor, reserving a right to live on the land and a vendor's lien to secure performance of the agreement, the land to become the property of the grantee upon the faithful performance of his agreement: Alford v. Alford, 1 Tex. Civ. App. 245: a conveyance of his homestead by a father to the son on condition that the former should have his support and a home as long as he lived; Martin v. Martin, 44 Kan. 295; a mortgage back by the grantee to secure fulfillment of consideration expressed in the conveyance by the grantor of an agreement to support the grantor; Richter v. Richter, *supra;* a deed reserving a right to live on the land till grantor's death, reserving support and providing for certain payments to minor children, and after due performance thereof vesting the estate in the grantee. Bank of Suisun v. Stark, 106 Cal. 202. Where A conveyed land to B for a mentioned valuable consideration, and the deed also stated, that it was a gift from A to B, that A was to remain in possession during his natural life, that B was to pay the taxes and support A, and then the land was to be B's; the court held, that there was a covenant by B, but no condition, because there were no appropriate words to create a forfeiture and no provision for a re-entry or a reverter. Studdard v. Wells, *supra*. Where the conditions mentioned are merely nominal, and evince no intention of actual or substantial benefit to the party, to whom or in whose favor they are to be performed, they may, by special statute of Minnesota, be disregarded. Sioux City, etc. R. R. v. Singer, 49 Minn. 301.

Where estates are conveyed on conditions subsequent, such conditions become charges on the lands in whosesoever hands they may be. Rohn v. Odenwelder, 162 Pa. St. 346; McClure v. Cook, 39 W. Va. 579; Goodpaster v. Leathers, *supra*. When a right of way is conveyed with a reservation of an annual pay-

ment to the grantor, a subsequent purchaser of the land may sue for such payments. Raby v. Reeves, 112 N. C. 688. Where the deed makes the condition therein binding on the grantee, his heirs and assigns, and makes it perpetually binding upon the owners of the land, the apparent intention is to bind the grantee only while he owns the land. Hickey v. Lake Shore, etc. R. R., 51 Ohio, 40.

Breach of Condition Subsequent.—When land is conveyed, and there is a condition subsequent contained in the deed, the fee is in the grantee, until there is a breach of the condition by the grantee and a re-entry by the grantor or his heirs. Vail v. Long Island, etc. R. R., 106 N. Y. 283. The grantor may waive the forfeiture. O'Brien v. Wagner, 97 Mo. 94. It has been said there must be an actual re-entry; Missouri H. Soc. v. Academy of S., 94 Mo. 459; but the better opinion is that the necessity for an actual re-entry has ceased with the disappearance of the fictions and devices resorted to, upon which to found the action of ejectment. Sioux City, etc. R. R. v. Singer, 49 Minn. 301. The breach of the condition creates a forfeiture of the estate, and the grantor may sue at law to obtain possession of the property; Alford v. Alford, 1 Tex. Civ. App. 245; Rohn v. Odenwelder, 162 Pa. St. 346; or in equity to rescind the contract; Martin v. Martin, 44 Kan. 295. If the grantor is already in possession of the property when the breach of condition occurs, he can sue to quiet his title. Richter v. Richter, *supra*. He will be presumed to hold under the forfeiture, but as this is only a presumption of law, it may be overcome by evidence to the contrary. O'Brien v. Wagner, 94 Mo. 93. Where a defendant claims an acquiescence in, and waiver of, a breach of a condition subsequent, he must allege and prove such a lapse of time since the breach as would authorize a court to presume an acquiescence and a waiver. Kinney v. Shelbyville [Ky. Sept. 1886], 1 S. W. Rep. 472.

S. S. MERRILL.

BOOKS RECEIVED.

American Negligence Cases (Cited Am. Neg. Cas.) A Complete Collection of all Reported Negligence Cases decided in the United States Supreme Court, the United States Circuit Courts of Appeals, all the United States Circuit and District Courts, and the Courts of Last Resort of all the States and Territories, from the Earliest Times, with Selections from the Intermediate Courts. Topically Arranged with notes of English Cases and Annotations. Prepared and Edited by T. F. Hamilton, of the New York Bar. Vol. 1. New York. Remick, Schilling & Co. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Accounting by Administrator.—An administrator, in settling his accounts, presented a voucher signed by deceased's widow for payments alleged to have been made her in pursuance of an order granting her a certain amount as a family allowance: Held, that a creditor of the estate could not object to the allowance of the voucher as a credit on the ground that the amount covered by it had not been actually paid the widow.—IN RE FISHER'S ESTATE, Cal., 42 Pac. Rep. 237.

2. ADVERSE POSSESSION.—Rev. St. art. 3198, requires that adverse possession be commenced and continued under a claim of right inconsistent with the claim of another: Held, that one who enters upon lands under the erroneous belief that it is part of the public domain, does not hold adversely to the true owner thereof, nor will it be presumed that he holds adversely to all save him who he erroneously supposed was the true owner.—LEON & H. BLUM LAND CO. v. ROGERS, Tex., 32 S. W. Rep. 714.

3. ANIMALS—Offspring.—As a general rule the owner of the mother is the owner of the offspring born during such ownership. This ownership would continue until divested by some contract, express or implied, between the owner and some other person. A person paying service fees and taxes, and rearing the stock, with the consent or knowledge of the owner, does not thereby become vested with the title to the colts, or any part thereof.—MORSE v. PATTERSON, Kan., 42 Pac. Rep. 255.

4. APPEAL — Acceptance of Benefits.—Where a creditor, suing to set aside a deed with preferences, accepts his proportionate share of the proceeds remaining after the preferred claims have been satisfied according to the judgment in the action, he cannot appeal, at least where he is a non-resident, and has not filed a bond other than for costs.—DUNHAM v. RANDALL & CHAMBERS CO., Tex., 32 S. W. Rep. 720.

5. APPEAL—Record.—Under Rev. St. 1894, § 662 (Rev. St. 1881, § 650), requiring collateral motions, together with rulings of the court thereon and exceptions thereto, to be made a part of the record by bill of exceptions or special order, an order reciting that the court, "having heard said motion, overrules the same, to which ruling of the court the defendant at the time excepts, and the same is now ordered to be made a part of the record," is, on account of its indefiniteness, insufficient to make the motion, the ruling, or exception a part of the record.—RUSS v. RUSS, Ind., 41 N. E. Rep. 941.

6. ASSUMPSIT — Joint Purchase — Agency.—Where plaintiffs and defendants jointly purchased property for a price which defendants represented was the lowest for which the land could be obtained, plaintiffs are entitled to recover from defendants a proportionate part of the commission paid by the vendor pursuant to a prior agreement for effecting a sale of the land, plaintiffs being ignorant of the payment until after the sale.—SEEHORN v. HALL, Mo., 32 S. W. Rep. 643.

7. ATTACHMENT — Affidavit — Bond.—An affidavit for attachment which corresponds with the petition as to

the names of the parties, the amount sued for, and the nature of the suit, and is indorsed with the file number of the suit, filed with the papers in the cause, and acted upon by the clerk in issuing the writ, sufficiently identifies the suit, though not filed on the same day as the petition.—EILERS v. FORBES, Tex., 32 S. W. Rep. 709.

8. AWARD — Building Contract.—Where a contract with a railroad company for construction of a building provides that all allowances and differences not agreed on before work has begun shall be referred to its chief engineer for settlement, his decision will, in the absence of fraud or clear injustice, be conclusive on the parties.—EAST TENNESSEE, V. & G. RY. CO. v. CENTRAL LUMBER MANUF'G CO., Tenn., 32 S. W. Rep. 635.

9. BANKS — Insolvency — Trusts.—On the insolvency of a bank which has collected notes sent to it for collection, and failed to remit the proceeds, a trust will be imposed on the assets of the bank in favor of the person sending them, as against the general creditors of the bank, if it is proven that the moneys collected were deposited in the bank and commingled with other funds of the bank, or if they went into property represented by the assets in the hands of the assignee of the bank.—WINDSTANDLEY v. SECOND NAT. BANK OF LOUISVILLE, Ind., 41 N. E. Rep. 956.

10. BANKS — Insolvent Bank — Collection of Note.—Where plaintiff sent a note and mortgage to a bank, with directions to collect the same, and "forward draft" for the amount less its collection fee, the money received by the bank in payment thereof was not impressed with a trust in plaintiff's favor, so as to entitle her to recover the whole amount as a preferred claim from a receiver appointed for the bank after the collection was made, though said bank was insolvent at the time it received said note and mortgage.—SAYLES v. COX, Tenn., 32 S. W. Rep. 626.

11. BOUNDARIES — Adverse Possession.—That one, from the time of receiving a deed of a farm, occupies it up to an existing fence, which is beyond the true boundary line, is not enough to show that his possession of the intervening strip is adverse.—FULLER v. WORTH, Wis., 64 N. W. Rep. 995.

12. BUILDING AND LOAN ASSOCIATION — Alteration of Contract.—Where a building association loaned money which was to be paid at the maturity of certain shares of its stock owned by and pledged to it by defendant, which stock was to be paid for in installments, and was to be credited with the earnings derived from the loan of the installments so paid, and said association subsequently changed its by-laws so as to authorize it to cease making assessments on stock of non-borrowing members, and fix a different time for the maturity of the debts of borrowing members, said association thereby rendered itself powerless to perform its contract with defendant, and defendant was entitled to be credited with the amount he had already paid in, and, having paid more than the original debt, he should be discharged.—INTERNATIONAL BUILDING & LOAN ASS'N v. BRADEN, Tex., 32 S. W. Rep. 704.

13. CARRIERS—Live Stock Shipment.—In an action to recover for breach of a carrier's contract to furnish cars for a shipment of live stock, the measure of damages is the difference between the market price of the stock as they were shipped on the date at which it was agreed they should be delivered and the market price in the same market on the date the stock should have been delivered, leaving at the time they did.—SAN ANTONIO & A. P. RY. CO. v. PRATT, Tex., 32 S. W. Rep. 705.

14. CARRIERS — Reasonableness of Regulation.— A regulation of the defendant, intended to secure the orderly and certain collection of fares or tickets from all passengers on its suburban railway train, considered, and held to be a reasonable one, which its conductor was legally justified in enforcing against the plaintiff, although he had no previous notice of it.—FABER v. CHICAGO G. W. RY. CO., Minn., 64 N. W. Rep. 918.

15. CONSTITUTIONAL LAW—Descent of Homestead.—Under the law in force prior to 1889, the homestead of the debtor, upon his decease, became assets for the payment of his debts, subject only to the homestead rights of his widow and minor children, if any. The Probate Code of 1889 provided that the homestead of the deceased shall descend to his heirs generally, in the order of descent, "free from all debts or claims upon the estate of the deceased:" Held, that this provision is invalid as respects contracts made before its enactment, for the reason that it impairs their obligation by so materially affecting the subsisting remedy as to substantially lessen their value. — DUNN v. STEVENS, Minn., 64 N. W. Rep. 924.

16. CONSTITUTIONAL LAW—Drawing of Jurors.—Act April 1, 1891, providing a method for the selection of jurors in counties containing a city of a certain population, different from the general jury law, does not violate Const. art. 4, § 53, prohibiting the passage of special laws regulating the affairs of counties, or the summoning or impaneling of jurors, though, when enacted, it applies to but one county in the State, and the basis of classification is the "last preceding national census," as it may apply to other counties when some future national census shows a sufficient population.—DUNNE v. KANSAS CITY CABLE RY. CO., Mo., 32 S. W. Rep. 641.

17. CONSTITUTIONAL LAW—Supreme Court—Jurisdiction.—An action to effect the reinstatement of mortgage liens which has been released of record is not within Const. 1875, art. 6, § 12, conferring appellate jurisdiction on the Supreme Court in actions involving the title to real estate.—LEMMON v. LINCOLN, Mo., 32 S. W. Rep. 662.

18. CONSTITUTIONAL LAW—Taxation.—Rev. St. 1889, § 7654 (Act March 8, 1879), requiring, as a condition to the levy of taxes for certain purposes, an order of the Circuit Court therefor, is not violative of the obligation of contracts, in the case of taxes for payment of bonds issued after the enactment of such law, under a contract thereafter made, though they are issued in lieu of bonds issued before its enactment.—STATE v. ST. LOUIS, K. & N. W. R. CO., Mo., 32 S. W. Rep. 664.

19. CONTEMPT.—A contempt, though punishable by criminal prosecution, is also punishable in contempt proceedings.—STATE v. FAULDS, Mont., 42 Pac. Rep. 285.

20. CONTEMPT—Appeal.—A judgment imposing a fine and imprisonment for contempt of court under section 13, ch. 110, Laws 1890, may be reviewed by writ of error, and upon such review this court will consider (1) whether or not the alleged act of contempt was in law a contempt of court; (2) whether or not there is any evidence tending to establish the commission of the act; and (3) whether or not the court had jurisdiction to pronounce the judgment.—STATE v. MARKUSON, N. Dak., 64 N. W. Rep. 934.

21. CONTRACT—Architect.—Where a building contract provides that payment shall only be made on the architect's certificate, it is not a sufficient excuse for failure to procure such certificate that the contractor feared to apply for it because he believed the architect to be fraudulently prejudiced against him.—GILMORE v. COURTNEY, Ill., 41 N. E. Rep. 1023.

22. CONTRACTS— Employment of Teachers.—A contract by a school district for the employment of a teacher from a certain time did not specify the duration of the contract, but provision was made for the closing of the school under certain circumstances: Held, that the contract continued for the school year, and the teacher was entitled to teach for that period, subject to the contingencies specified in the contract.—BUTCHER v. CHARLES, Tenn., 32 S. W. Rep. 681.

23. CONTRACTS—Public Policy.—The public policy of a State or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to what the interest of the public demands. A party who seeks to put a restraint upon the freedom of contract in any

case must make it plainly and obviously clear that the contract in question is against public policy.—HARTFORD FIRE INS. CO. v. CHICAGO, M. & ST. P. RY. CO., U. S. C. C. of App., 70 Fed. Rep. 201.

24. CONTRACT — Subscription.—An instrument reciting that the undersigned acknowledge themselves indebted to a certain railroad company in a certain sum, for the payment of which they bind themselves, the conditions of the obligation being that, whereas the company proposes the construction of a certain line, on such conditions as to time of construction as are provided by the laws of the State, if the obligors secure to it a right of way without cost to it the obligation to be void, is a proposition from the signers, requiring acceptance within a reasonable time to make it binding, and does not allow acceptance at any time within the period allowed by the laws of the State for completion of the work.—FT. WORTH & R. G. RY. CO. v. LINDSEY, Tex., 32 S. W. Rep. 714.

25. CORPORATION — Expiration of Charter. — After a corporation's period of existence has expired by force of a general statute (1 Rev. St. 1855, p. 369, § 1), it cannot execute a valid conveyance; and defendant, claiming by adverse possession, and not being party or privy to the deed, is not precluded from questioning the validity of such deed as a link in plaintiff's chain of title, as it is not the act of a corporation *de facto*.—BRADLEY v. REPPELL, Mo., 32 S. W. Rep. 645.

26. CORPORATIONS—Powers in Foreign States.—In the absence of statutes in other jurisdictions modifying them, the grants and limitations of the franchises of a corporation, and of the powers of its officer and agents, contained in the general laws of the State under which it is incorporated, constitute the law of its existence, and go with it into every jurisdiction in which it is permitted to act, and there govern and limit those franchises and powers to the same extent as in the place of its creation. Accordingly, held: that where the officers and agents of an insolvent corporation had been enjoined, pursuant to the laws of the State of its creation, from exercising any of its powers or franchises, or using its name, for any purpose, by a court having jurisdiction of the corporation and its property, which had appointed a receiver of the corporation, such officers and agents could not lawfully enter an appearance for such corporation in an action brought against it in another jurisdiction, so as to authorize a judgment against it. — BUST v. UNITED WATERWORKS CO., U. S. C. C. of App., 70 Fed. Rep. 129.

27. CORPORATIONS—Stock Subscriptions—Payment.—A purchaser of stock in a Missouri business corporation may pay therefor in real estate, subject always to the scrutiny of the courts into its honesty, as to the valuation placed on the real estate. If this valuation be fixed in good faith, although it should subsequently transpire to have been greatly excessive, the courts will not disturb the arrangements.—NORTHWESTERN MUT. LIFE INS. CO. v. COTTON EXCHANGE REAL ESTATE CO., U. S. C. C. (Mo.), 70 Fed. Rep. 155.

28. CORPORATION—Stockholders—Payment of Stock.—Subscriptions for stock of a corporation may be paid in money, or in property such as is within the power of a corporation to acquire and hold, or in labor for the corporation in the proper furtherance of its purposes and business. Where payment of subscriptions for stock is made in property or labor, it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock, and if labor, it must be reasonably of the face value of the stock.—GILKIE & ANSON CO. v. DAWSON TOWN & GAS CO., Neb., 64 N. W. Rep. 978.

29. COUNTERCLAIM — When Allowable. — Where the lease authorizes the lessor to take the furniture of the lessee, and sell the same to satisfy unpaid rent, and also requires the lessor to keep the building in repair, in replevin by the lessor to recover possession of the furniture a counterclaim by the lessee for damages arising from failure of the lessor to keep the premises in repair is one arising out of the contract which is the foundation of the lessor's claim (Rev. St. § 2656, subd. 1), and is therefore properly allowed. — COLLINS v. MORRISON, Wis., 64 N. W. Rep. 1000.

30. COUNTIES—Liability for Torts.—Const. 1879, art. 1, § 14, which provides that "private property shall not be taken or damaged for public use without just compensation," renders a county liable for damages to plaintiff's property consequent on the construction of a bridge in such a manner that its abutments turn the current of the stream in such a way as to cut into his land.—TYLER v. TEHAMA COUNTY, Cal., 42 Pac. Rep. 240.

31. COUNTY WARRANTS—Cancellation and Reissue.—In proceeding by a county for the cancellation and reissuance of warrants, the failure of the order for publication of notice to holders of warrants to present the same, the return of the sheriff thereon, and the final order to show that one of the newspapers in which the publication was made was published in the county where the proceedings were had, as required by Act Feb. 15, 1875, § 1 (Acts 1874-75, p. 152), renders the proceedings void, though the return and final order recite that the notice was given as required by law.—CRUDUP v. RICHARDSON, Ark., 32 S. W. Rep. 684.

32. COVENANT.—Where G is the owner of nine lots, and conveys seven of them to P, who assumes and agrees to pay a mortgage upon the nine lots, and afterwards conveys the remaining two lots to F by deed of general warranty, and such conveyance to F is made during the pendency of a foreclosure of the mortgage assumed by P, the covenant to pay such incumbrance becomes a chose in action upon which F cannot maintain a cause of action.—PEARSON v. FORD, Kan., 42 Pac. Rep. 257.

33. CREDITOR'S BILL.—A bill by judgment creditors on behalf of themselves and certain other judgment creditors, against the debtor and various persons to whom he transferred distinct parts of his property, the sole purpose of which is to impound all the assets of the debtor to pay his debts, is not multifarious.—HULBERT v. DETROIT CYCLE CO., Mich., 64 N. W. Rep. 950.

34. CRIMINAL LAW—Accomplices.—A mature person of ordinary intelligence, who knowingly offers as a bribe to a juror money given her for that purpose, becomes an accomplice.—STATE v. CARR, Oreg., 42 Pac. Rep. 215.

35. CRIMINAL LAW—Arguments of Counsel.—A verdict will not be reversed because of improper remarks by the prosecuting attorney, unless defendant requested the court to instruct the jury to disregard such remarks, after first reprimanding counsel. — HINES v. STATE, Tex., 32 S. W. Rep. 701.

36. CRIMINAL LAW—Assault with Intent to Murder.—On a trial for assault with intent to murder, the court need not define express or implied malice, but it is sufficient if it defines malice aforethought.—ULUN v. STATE, Tex., 32 S. W. Rep. 699.

37. CRIMINAL LAW—Burglary — Evidence. — H was awakened at night by a noise in the chamber near the door leading to her store, and discovered defendant lying on the floor, as if asleep. The latter immediately arose, escaped through the store door, which H had locked on retiring, leaving the key therein: Held sufficient to warrant a conviction of burglary with intent to steal.—MULLINS v. STATE, Tex., 32 S. W. Rep. 691.

38. CRIMINAL LAW—Embezzlement.— That the relation of debtor and creditor exists between a principal and his agent, and that, on a balancing the account, the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzling or converting to his own use the property of his principal.—HAMILTON v. STATE, Neb., 64 N. W. Rep. 965.

39. CRIMINAL LAW—Insanity as Defense—Evidence.—Testimony by witnesses that they had known defendant for many years, and that they did not think that

he was capable of distinguishing between right and wrong to such an extent as to be able to know that it was wrong to commit burglary, is not a sufficient foundation to render admissible their opinions as to whether "he would have sufficient mental power to keep from committing a crime" if he knew that it was wrong.—SHAEFFER V. STATE, Ark., 32 S. W. Rep. 679.

40. CRIMINAL LAW—Killing Escaping Felon.—A sheriff or other police officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life; but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of, at least manslaughter.— LAMME V. STATE, Neb., 64 N. W. Rep. 956.

41. CRIMINAL LAW—Swindling—Confidence Game.—1 STAIR & C. St. p. 782, ch. 38, par. 143, § 98, which provides a punishment for "every person who shall obtain or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus check, or by any other means, instrument or devise, commonly called the confidence game," applies to all cases of swindling in which advantage is taken of the confidence reposed by the victim in the swindler, even though no false or bogus checks or other commercial paper are used.—MAXWELL V. PEOPLE, Ill., 41 N. E. Rep. 995.

42. CRIMINAL LIBEL—Indictment.— 2 Comp. Laws, § 8246, provides that it is not necessary to allege extrinsic facts for the purpose of showing the application of the defamatory matter to the party libeled, but that it is sufficient to state generally that the same was published or spoken concerning him, and such fact may be proved on the trial: Held that, without alleging the inducement in the indictment, it was proper to show that by using the name of a fictitious corporation defendant intended to refer to the manager thereof, and that certain words used in the publication were spoken of said manager.— PEOPLE V. RITCHIE, Utah, 42 Pac. Rep. 209.

43. CRIMINAL TRIAL — Homicide — Competency of Jurors.—On the trial of a saloon keeper for murder a juror is not disqualified by the fact that he has a prejudice against the business of saloon keeping, the matter at issue having no reference to such business. —THIEDE V. PEOPLE OF TERRITORY OF UTAH, U. S. S. C., 16 S. C. Rep. 62.

44. DEED—Delivery.—A man executed a deed conveying land to his children, and gave it to one of them, telling her to keep it, and that, if he never called for it, she must put it on record at his death. He remained in possession of the land till his death, mortgaged it, offered it for sale, and exercised other acts of ownership over it. The deed remained in the daughter's hands, and was not recorded till after his death: Held, that there was no effectual delivery of the deed.—WILSON V. WILSON, Ill., 41 N. E. Rep. 1007.

45. DESCENT AND DISTRIBUTION—Adoption of Illegitimate Child.—Mill. & V. Code, § 4390, confers on a child legally adopted the capacity to succeed to and inherit the real and personal estate of the adopting father. *Id.* § 3273, provides that the property of an illegitimate child dying intestate without issue, or husband or wife, shall go to the mother, and then equally to brothers and sisters: Held, that where an illegitimate child is adopted by his father, but not legitimated, property inherited by him from his father will on his death without issue or wife living descend under the latter statute.—MURPHY V. PORTRUM, Tenn., 32 S. W. Rep. 633.

46. EJECTMENT—Receiver for Growing Crops.—2 Rev. St. 1894, § 1076 (Rev. St. 1881, § 1064), provides for a new trial in ejectment on the applicant giving an undertaking that he will pay all costs and damages which shall be recovered against him in the action: Held, that if plaintiff in ejectment is entitled to the crops sown by defendant after the first trial, which terminated in plaintiff's favor, plaintiff has his remedy on the bond for defendant's conversion thereof, and therefore a receiver to take charge of said crops should not be appointed.—STEPHENS V. KAGO, Ind., 41 N. E. Rep. 930.

47. EJECTMENT—Statute of Limitations.—The burden of proof is on the party pleading coverture in ejectment, to defeat the statute of limitations, to show that the adverse possession began after her marriage.—GROSS V. DISNEY, Tenn., 32 S. W. Rep. 632.

48. ELECTION—Marking Ballots.—3 Starr & C. St. p. 570, ch. 26, § 23, which says that the voter shall prepare his ballot by making in the appropriate margin or place a cross opposite the name of the candidate of his choice, is merely directory, and does not render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so.—PARKER V. ORR, Ill., 41 N. E. Rep. 1002.

49. ELECTION — Constitutional — Women.—The Utah enabling act (section 2) provides that male citizens, over 21 years of age, may vote for delegates to the constitutional convention, and that "persons possessing the qualifications for electors of delegates" may vote for or against the constitution. Section 4 allows the convention to provide for submitting the constitution to the people at an election at which "the qualified voters of said proposed State shall vote directly for or against the proposed constitution." The proposed constitution confers the elective franchise on women: Held, that women are not entitled to vote on the ratification or rejection of such constitution.—ANDERSON V. TYREE, Utah, 42 Pac. Rep. 201.

50. ELECTIONS — Local Option—Contest.—Sand. & H. Dig. §§ 4868, 4869, directing that the returns of an election to determine the question of granting or refusing liquor licenses "shall be sealed up and forwarded to the clerk of the proper county, and by him laid before the county court," and if the majority of the votes be for license it shall be lawful for the county court to grant a license, but if the majority be not for license it shall be unlawful, confer on the county court power in a proper proceeding, to inquire whether the vote has been fairly taken, and, if fraud be shown, the right to declare it illegal.—FREEMAN V. LAZARUS, Ark., 32 S. W. Rep. 680.

51. EMINENT DOMAIN—Award—Payment into Court.—Under Const. art. 2, § 21, and Rev. St. 1889, § 2736, providing that in condemnation proceedings the landowner's property shall not be disturbed till the award of commissioners is paid to him, or into court for him, where the railroad company, for whom the condemnation proceedings are had, pays the award into court, and takes possession of the land, the landowner has the right to immediately withdraw the money, and therefore is not entitled to interest thereon, pending the determination of the railroad company's exceptions to the commissioner's report.—CHICAGO, S. F. & C. RY. CO. V. EUBANKS, Mo., 32 S. W. Rep. 658.

52. EQUITY—Asserting Title to Land.—A complainant who has only an equitable title to land cannot maintain a suit in chancery to recover possession of the land from an adverse occupant, unless such occupant holds the legal title and the complainant seeks to obtain it, or unless the adverse occupant acquired possession of the land under the alleged equitable title, or is so connected therewith that it may be asserted against him. Accordingly, held, that a complainant asserting an equitable title to land could not maintain a suit in chancery to enforce it and to recover possession from occupants who alleged in the bill to be without any title, legal or equitable, to the land, and therefore occupied the position of mere trespassers.—CHURCH OF CHRIST AT INDEPENDENCE, MO. V. REORGANIZED CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, U. S. C. C. of App., 70 Fed. Rep. 179.

53. EQUITY—Parties—Quieting Title.—A purchaser of land had a deed made to a third person for his benefit. Discovering that there was an error in the deed, he had a correct deed made to another grantee, also in trust for him, and caused suit to be brought by such second

grantee against the first grantee to quiet title: Held, that the suit could not be maintained, since the second grantee was not the real owner of the property.—WHIPPLE v. GIBSON, Ill., 41 N. E. Rep. 1017.

54. EXECUTION SALE — Setting Aside.—A sale under execution of land of a judgment debtor will be set aside where the land so sold had been allotted the debtor as a homestead on a prior levy by another judgment creditor.—CALDWELL v. TAYLOR, Ky., 32 S. W. Rep. 678.

55. FEDERAL COURTS — Judge—Appointment for Another District.—A district judge acting in another district, in which the office of judge is vacant, by virtue of an appointment, regular on its face, made by a circuit judge, is an officer *de facto*, and his orders continuing the term in such district from day to day cannot be questioned on the ground that the circuit judge has no power of appointment in the case of a vacancy in the office of district judge.—MCDOWELL v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 111.

56. FEDERAL COURTS — Jurisdiction.—Where the appellate jurisdiction is described in general terms in a statute, so as to comprehend the particular case in question, no presumption can be indulged of an intention to oust or restrict such jurisdiction. Any statute claiming to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that its literal meaning would extend to cases which the legislature never intended to include in it.—UNITED STATES v. AMERICAN BELL TEL. CO., U. S. S. C., 16 S. C. Rep. 69.

57. FEDERAL COURTS—Federal Question.— Where a decision of the State Supreme Court, that the lessee of a railroad is not liable to pay as rent the amount paid by it to the State as taxes upon the earnings of the road, is put upon the grounds that it was the duty of the lessor to pay such taxes, and, the lessee having been compelled by law to make the payments, the law implied a promise by the lessor to repay; that the lessee was under no duty to incur the expense and dangers of testing by litigation the constitutionality of the statute under which the taxes were imposed; and that the lessor, as between it and the lessee, was guilty of laches,—the fact that the decision was also based on the ground that the statute did not impair the obligation of any contract does not confer appellate jurisdiction upon the United States Supreme Court.—RUTLAND R. CO. v. CENTRAL VERMONT R. CO., U. S. S. C., 16 S. C. Rep. 113.

58. HIGHWAYS—Vacation.— Proceedings of commissioners of highways attempting to lay out a highway 60 feet wide on land of which half the width lies in an incorporated city whose charter gives it power to open, alter, and abolish streets, are void for want of jurisdiction so far as the half in the city is concerned, since the grant of power to the city is exclusive.—SHIELDS v. ROSS, Ill., 41 N. E. Rep. 985.

59. HOMESTEAD.—Where the wife owns the undivided one-half of an hotel, in which she resides with her family and it is the only home her family has, it is her homestead, and her motion to discharge an attachment upon said hotel, in an action against her husband, is properly sustained, and the attaching creditor cannot inquire into the good faith of said husband in deeding said homestead to her.—MERCHANTS' NAT. BANK OF KANSAS CITY v. KOPPLIN, Kan., 42 Pac. Rep. 263.

60. HOMESTEAD—Rights of Widow and Children.— Under the homestead act of 1865, on the death of the husband, the fee of the homestead vests in the widow, subject only to the possessory rights of infant children during minority, and, on her death, descends to her heirs.—LINVILLE v. HARTLEY, Mo., 32 S. W. Rep. 652.

61. INJUNCTION— Irrigation Contract.— A complaint against an irrigation company to compel defendant to furnish water according to the terms of its contract with plaintiff alleged failure of defendant to deliver the water called for by it, and that it was impossible to secure water from any other source, and that without water valuable crops growing on the farms for which the water was to be supplied would be lost: Held that, as the complaint failed to show insolvency of defendant, no jurisdiction in equity was shown.—FULTON IRRIGATING DITCH CO. v. TWOMBLY, Colo., 42 Pac. Rep. 253.

62. INJUNCTION—Regulation of Weights by City.—Injunction will lie to restrain the enforcement of a municipal ordinance making it a misdemeanor to buy or sell certain articles except in the manner therein described, if such ordinance is invalid, though its validity was not determined in a prosecution or an action of a legal character.—SYLVESTER COAL CO. v. CITY OF ST. LOUIS, Mo., 32 S. W. Rep. 649.

63. INSURANCE—Conditions.—The existence of a lien on property is not a breach of a condition in a fire policy requiring "unconditional and sole ownership" in the assured.—ALAMO FIRE INS. CO. v. BROOKS, Tex., 32 S. W. Rep. 714.

64. INTOXICATING LIQUORS — Defendant, having a license to retail intoxicating liquors, which did not indicate the house in which the liquor should be sold, as required by law, set up a bar in his "grocery" building, and also one in an adjacent building designated as his "saloon," where he sold liquor by the drink, and posted his license: Held, that these facts were insufficient to support an indictment for selling liquor without a license.—PEARCE v. STATE, Tex., 32 S. W. Rep. 697.

65. JOINT TORT FEASORS — Contribution. — While an action in which judgment is rendered against two defendants for an injury resulting from the negligence of one only does not, in the absence of cross pleadings, determine the rights of defendants as between themselves, the fact of the liability of each to plaintiff is adjudicated, both as between them and him, and as between defendants themselves.—WESTFIELD GAS & MILLING CO. v. NOBLESVILLE & E. GRAVEL-ROAD CO., Ind., 41 N. E. Rep. 955.

66. JUDGMENT — Foreign Judgment — Res Judicata.— A judgment of a court of another State in administration proceedings, disposing of the decedent's property in that State to his father, sister, and brother, as his heirs, there being no adjudication of any claim to such property by his wife and child, does not operate as an estoppel against persons claiming, through such wife and child, the lands of the decedent in this State.—CLAPP'S EX'RS v. BRANCH, Tex., 32 S. W. Rep. 735.

67. LIBEL.—A publication which charges the plaintiff with being "a dangerous, able, and seditious agitator" is a libel, and actionable *per se*.—WILKES v. SHIELDS, Minn., 64 N. W. Rep. 921.

68. LIBEL.—To entitle a party to claim that an alleged libelous publication is privileged it must appear that it was made in the discharge of a public or private duty, or for the protection of his private interests, and that it was relevant and proper in that connection, and based upon a reasonable and probable necessity in the premises.—TRAYNOR v. SEILOFF, Minn., 64 N. W. Rep. 915.

69. LIMITATIONS — County Bridges. — Where obstructions are wrongfully put into a stream causing the current to be turned against the pier of a bridge, the statute begins to run against an action by the owner of the bridge, not from the time of the wrongful act, but from the time actual damages result therefrom to the bridge.—HOWARD COUNTY v. CHICAGO & A. R. CO., Mo., 32 S. W. Rep. 651.

70. LIMITATION OF ACTION — Statute. — Rev. St. art. 3218, providing that on the death of a person against whom there may be "cause of action" limitations shall cease to run for a year, or until the qualification of an executor or administrator for the deceased, applies to actions for the recovery of land.—WYNNE v. PARKE, Tex., 32 S. W. Rep. 726.

71. MARITIME LIENS — Watercrafts. — Steam dredges, to be used solely for digging under water, and not for navigation or the transportation even of the material which they bring up from the lake or river beds, are not watercrafts, within the meaning of the act (2 How. Ann. St. ch. 285, § 2) providing that "every watercraft of above five tons burthen, used or intended to be used in navigating the waters of this State, shall be subject to a lien thereon," etc.—BARTLETT V. STEAM DREDGE NO. 14, Mich., 64 N. W. Rep. 950.

72. MASTER AND SERVANT—Rule of Safe Place.—It is a positive duty which the owner of a mine owes to his servants, after the mine is opened and timbered, to use reasonable care and diligence to see that the timbers are properly set, and to keep them in proper condition and repair, and for this purpose to provide a competent mining boss or foreman, to make timely inspections of the timbers, walls, and roof of the mine. —WESTERN COAL & MINING CO. V. INGRAHAM, U. S. C. C. of App., 70 Fed. Rep. 219.

73. MECHANICS' LIENS — Priority over Mortgages.— Where mechanics' liens attach to property between the recording of two mortgages, the former of which is made subject to the latter, the last mortgage will be a first lien to the amount of the first mortgage, the mechanics' liens a second lien, the first mortgage a third lien, and the balance due on the last mortgage a fourth lien, on the land.—THORPE BLOCK SAVING & LOAN ASS'N V. JAMES, Ind., 41 N. E. Rep. 978.

74. MINES AND MINING—Extent of Claim.—Rev. St. U. S. § 2322, provides that locators shall have exclusive right to any vein or lode whose apex lies within the lines of the location, throughout its entire depth, though such vein or lode, in its downward course or dip, extends beyond the side lines of the location, but that the right to the portion outside such lines shall be confined to the portion lying between the points of intersection of the vein or lode with verticle planes dropped from the end lines of the location, or with the continuation of such planes: Held, that where the apex of a vein crosses the east end line of a location, and extends to and crosses its south side line, and thence passes into another location, and the dip is from the apex of the vein in the former location southward crossing the verticle plane of the south side line, such south side line will not be considered as an end line, but the owners of the former location have the right to all ore found on the dip south of their south side line, between the intersection of the vein with the verticle plane of their east end line and a parallel plane droped from the point where the apex crosses their south side line.—FITZGERALD V. CLARK, Mont., 42 Pac. Rep. 273.

75. MORTGAGE— Foreclosure Judgment.— A number of persons purchased land, and caused the title to be taken in the name of one of the number, who gave his notes, secured by mortgage on the land, for the deferred purchase money. These notes were signed, "A B, Trustee," but neither the notes nor the mortgage disclosed the nature of the trust or the names of the *cestuis que trustent:* Held, that on foreclosure of the mortgage the holder was entitled to a deficiency judgment against the trustee, but not the *cestuis que trustent.* —FARREL V. REED, Neb., 64 N. W. Rep. 959.

76. MORTGAGE TO SECURE HUSBAND'S DEBT.—A mortgage of the separate property of the wife, executed by her jointly with her husband, to secure the purchase price of goods, reciting that the grantors convey the land, and also the goods "which we have purchased," to secure notes given for the goods, and acknowledging that the grantors own the land equally as tenants in common, and not by entirety, will not bind the wife where the mortgage was procured from the wife after sale and delivery of the goods to the husband alone, who had no authority to act for his wife.—COLE V. TEMPLE, Ind., 41 N. E. Rep. 942.

74. MUNICIPAL CORPORATION— Annexation of Land— Review.—The action of the board of county commissioners in passing on a petition of a city council for annexation of territory to the city, which must give the reasons why, in the opinion of the council, annexation should take place, and which must be on notice to parties interested, is judicial, and therefore courts are properly given jurisdiction of an appeal therefrom.—FORSYTH V. HAMMOND, Ind., 41 N. E. Rep. 950.

78. MUNICIPAL CORPORATION—Assessment—Payment. —The failure of the city treasurer, when payment of a special assessment is made to him to enter the proper credits on the assessment rolls, and to give the property owner a voucher for his payment, as required by statute, does not affect the validity of the payment.— INDIANA BOND CO. V. BRUCE, Ind., 41 N. E. Rep. 958.

79. MUNICIPAL CORPORATION—Exemptions—Salaries. —The rule exempting fees or salary due municipal officers or employees from the claims of their creditors may be invoked by the employee as well as by the municipality, and neither can waive the exemption so as to bind the other.—BAIRD V. ROGERS, Tenn., 52 S. W. Rep. 630.

80. MUNICIPAL CORPORATION — Segregated Territory. —Under St. 1889, p. 356, authorizing the segregation of territory from cities, but providing that such territory should not be relieved in any manner whatsoever from any liability contracted by the city prior to such exclusion, the territory segregated from the city of San Diego was liable for the payment of its proportionate part of the bonds of said city after separation as well as before, though no part of the money realized from said bonds was expended on said territory.—JOHNSON V. CITY OF SAN DIEGO, Cal., 42 Pac. Rep. 249.

81. MUNICIPAL CORPORATION—Streets—Acceptance.— A well-known and much-traveled thoroughfare, used as a public street for many years, in a portion of the city compactly built up, relative to which an ordinance was passed, fixing its grade, and extending it over other lands, is a public street, so as to make the city liable for failure to keep it in a reasonably safe condition, without proof of dedication.—MEINERS V. CITY OF ST. LOUIS, Mo., 32 S. W. Rep. 637.

82. NEGLIGENCE—Contributory Negligence — Pleading.—In actions for personal injuries, brought in the federal courts, plaintiff is not required to plead or prove freedom from contributory negligence. Such negligence is matter of defense to be averred and proved by defendant.—BERRY V. LAKE ERIE & W. R. CO., U. S. C. C. (Ind.), 70 Fed. Rep. 193.

83. NEGLIGENCE—Degree of Care of Child.—A child of nine years of age is not guilty of negligence if he exercises that degree of care which under like circumstances would reasonably be expected from one of his years and intelligence. Whether he used such care in a particular case is a question for the jury. And even though the petition might, if the plaintiff were an adult, be construed as disclosing contributory negligence, an averment that the plaintiff was at the time a child of nine years of age, and of immature experience and judgment, is sufficient to rebut the presumption of contributory negligence.—LAKE ERIE & W. R. CO. V. MACKEY, Ohio, 41 N. E. Rep. 980.

84. NEGOTIABLE INSTRUMENTS—Bona Fide Purchaser —Accommodation Paper.—Mere notice that a note is accommodation paper will not prevent an indorsee for value in the ordinary course of business from being a *bona fide* purchaser, nor impose upon him the duty of inquiring as to the particular purpose for which it was executed. In the absence of notice to the contrary, he has a right to assume that it was executed for the purpose of being sold or discounted by the payee in the usual course of business.—TOURTELOT V. REED, Minn., 64 N. W. Rep. 928.

85. NEGOTIABLE INSTRUMENT — Commercial Paper.— An instrument made in Kansas contained a promise to pay to K or order. for value received, $3,000, five years after date, with interest at 8 per cent., payable semi-annually according to the tenor of interest coupons annexed, together with an agreement that the instrument should be governed by the laws of Kansas, where

it was made payable; that the "note" and coupons should draw 12 per cent. interest after maturity, and should all mature upon default on any coupon; and a recital that the instrument was secured by mortgage on real estate: Held, that this was a negotiable commercial instrument.—DE HASS v. DIBERT, U. S. C. C. of App., 70 Fed. Rep. 227.

86. NEGOTIABLE INSTRUMENT—Notes—Joint and Several Indorsers.—Under Mill. & V. Code, § 3486, making all joint obligations joint and several, an indorser on a note, who has notice of non-payment and protest, is not discharged because such notice is not given other indorsers.—JARNIGEN v. STRATTON, Tenn., 32 S. W. Rep. 625.

87. OFFICE AND OFFICER — Estoppel to Question Creation.—One who has accepted an appointment by a city council to an office which the council had power to create, is estopped from showing that the council did not follow the prescribed mode of creating the office.—BUCK v. CITY OF EUREKA, Cal., 42 Pac. Rep. 243.

88. PARTNERSHIP—Assets — Firm and Private Creditors.—Where one owning the entire assets of a business transfers the legal title thereto to another, and allows him to conduct the business as his partner, such assets will in equity be considered partnership property, as between those who trusted the two as partners and the individual creditors of either.—THAYER v. HUMPHREY, Wis., 64 N. W. Rep. 1007.

89. PARTNERSHIP — Firm Debts.—One G, upon forming a partnership with M, borrowed from K the amount of his contribution to the firm capital, giving therefor his note, with his wife and a third party as sureties. After such note had been several times renewed in the same form, K sued the firm for the amount due, and induced G to give him a note of the firm for such amount, and to secure it by a chattel mortgage on the firm property: Held, that such acts of G could not, without the consent of his partner, change his individual debt to K into a firm debt, and that M was entitled to have the mortgage set aside.—KIRBY v. MCDONALD, U. S. C. C. of App., 70 Fed. Rep. 189.

90. PLEADING — Negligence — Verdict.—In an action for personal injuries, allegations in the declaration that the accident took place in the night; that plaintiff had no notice of the danger; that he was injured while in the performance of his duties; and that he was then in the place where his duty required him to be,—constitute, after verdict, a sufficient averment of due care by plaintiff.—GERKE v. FANCHER, Ill., 41 N. E. Rep. 982.

91. PUBLIC LANDS — Homestead — Timber.—A settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuilding, and fences, and perhaps may exchange such timber for lumber, to be devoted to the same purposes but he has no right to sell timber for money except so far as the same may have been cut for the purpose of cultivation.—SHIVER v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 54.

92. PUBLIC LANDS—Pre-emption Right.—The fact that the local land officers wrongfully refused an application to pre empt certain land does not prevent the attaching of the pre-emption right to the land from the date of the application, so as to except it from a railroad grant subsequently located; and the fact that the applicant finally obtains title by means of an act of congress passed for his relief is immaterial.—WEEKS v. BRIDGEMAN, U. S. S. C., 16 S. C. Rep. 72.

93. RAILROAD COMPANIES—Accidents at Crossings.—Where the declaration alleges that the accident occurred at a certain public crossing, and the court of its own motion instructs the jury that plaintiff cannot recover unless it did occur at that place, it is proper to refuse as unnecessary instructions as to the law governing accidents at places other than crossings.—BALTIMORE & O. R. CO. v. STANLEY, Ill., 41 N. E. Rep. 1012.

94. RAILROAD COMPANY—Fire from Locomotive. — Where, in an action for the burning of land, the evidence of damages relied on all tends to show its depreciation in value as meadow land, it is not error to charge the jury to find such sum as will compensate for the injury done the turf and roots, taking into consideration the purposes to which the land was appropriated or adapted, instead of declaring the damages to be the difference in the market value of the land immediately before and after the injury.—GULF, C. & S. F. RY. CO. v. JAGOE, Tex., 32 S. W. Rep. 717.

95. RAILROAD COMPANIES—Registering Trains.—Rev. St. 1894, § 5186, requiring every railroad company at any station at which "there is a telegraph office" to register, on a blackboard kept in a conspicuous place for that purpose, 20 minutes before a passenger train is due by schedule time, whether it is on time, and, if late, how late, does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the day-time.—TERRE HAUTE & I. R. CO. v. STATE, Ind., 41 N. E. Rep. 952.

96. RAILROAD RIGHT OF WAY.—A grant of a strip of land to a railroad company, "for right of way and for operating its railway only," gave to the grantee a mere easement in such strip.—BLAKELY v. CHICAGO, K. & N. R. CO., Neb., 64 N. W. Rep. 972.

97. RELEASE—Consideration— Burden of Proof.—In an action to recover for delay in furnishing cars the burden of proving want of consideration in a release set up by defendant is upon plaintiff.—MISSOURI, K. & T. RY. CO. v. PENNINGTON, Tex., 32 S. W. Rep. 706.

98. REPLEVIN—Right to Possession.—Where a vendee of a bill of sale given as security allows the vendor to keep possession of the property under a lease, the vendee cannot maintain replevin against one seizing the property.—SCHWEITZER v. HANNA, Wis., 64 N. W. Rep. 997.

99. RES JUDICATA—Decree of State Court.—The conclusiveness of a decree in regard to the title to land, based on a disclaimer filed in the case, cannot be affected by an unsworn statement made by one of the parties thereto in a bill subsequently filed by him, though not signed by him, that the attorney making the disclaimer acted without authority.—DUNHAM v. JONES, U. S. S. C., 16 S. C. Rep. 108.

100. SALE—Defenses.—An order for nursery stock of a certain kind or quality, the price for the whole being stated in the order in a lump sum, is not severable, but entire; and the maker of the order is not obliged to receive the stock if, in whole or in a substantial or material portion, it is not of the kind or quality ordered.—BRYANT v. THESING, Neb., 64 N. W. Rep. 967.

101. SALE—Delivery to Carrier—Title.—Where defendants ordered goods from samples at plaintiff's store in another State, and directed shipment to Michigan, where defendants were to have the privilege of examining them, and, if found to be like samples, they were to be paid for, title to the goods passed on delivery of the same to the carrier, there being no evidence of an agreement that the title should not pass until the goods were examined. — KUPPENHEIMER v. WERTHEIMER, Mich., 64 N. W. Rep. 952.

102. SALE—Rescission for Fraud.—A statement made to a commercial agency by a partnership of its assets and liabilities, "as a basis for credit," in which a space for "loans from friends or relatives or any other obligations" is left blank, when in reality each of the partners had borrowed on his individual note from his wife money which had been put into the firm business, is not sufficient evidence of fraud to authorize the rescission of his contract by one who, in reliance on such statement, had sold and shipped goods to the partnership in the regular course of business.—VERMONT MARBLE CO. v. SMITH, Ind., 41 N. E. Rep. 973.

103. SCHOOL DISTRICTS — Appointment — County Superintendent.—Where the act of the county superintendent of schools in drawing an order apportioning school funds is ministerial only, the county treasurer is not precluded from questioning the right of such county superintendent to issue the order.—SCHOOL

DIST. NO. 2 OF MULTNOMAH CO. v. LAMBERT, Oreg., 42 Pac. Rep. 221.

104. SPECIFIC PERFORMANCE — Defenses.—One who receives the benefits of the substantial performance of a contract, and retains them, after a technical default in the performance by the other party, until it is impossible to put the latter in the situation he occupied when the contract was made, and when the default occurred, cannot entirely defeat a suit for specific performance, on the ground that the complainant has failed to completely perform the contract on his part. —GERMAN SAVINGS INST. v. DE LA VERGNE REFRIGERATING MACH. CO., U. S. C. C. of App., 70 Fed. Rep. 146.

105. SUBROGATION—Payment by Widow of Husband's Debts.—One who furnishes money to her husband's administrator to pay decedent's debts is entitled to recover, on the doctrine of subrogation, though the evidence does not affirmatively show that when she furnished it she had any intention of requiring it to be repaid, where it does not appear that she made a gift of it.—TYLER'S ESTATE v. TYLER, Ind., 41 N. E. Rep. 965.

106. TELEGRAPH COMPANY — Damages.—A telegraph company failing to deliver a telegram is liable for the loss of prospective profits, where it appeared that, if plaintiffs had received the telegram containing an offer to purchase cotton, they would have accepted it, and would have bought and shipped the cotton at a less price than that offered.—WESTERN UNION TEL. CO. v. NAGLE, Tex., 32 S. W. Rep. 707.

107. TENANTS IN COMMON—Purchase of Outstanding Title.—The general rule that a tenant in common may not acquire an outstanding title as against his cotenant rests upon considerations of mutual trust, and does not, therefore, apply where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times.—STEVENS v. REYNOLDS, Ind., 41 N. E. Rep. 931.

108. TRUSTS—Accounting by Trustee.—On foreclosure of a railroad mortgage, the bondholders agreed that a trustee might bid in the property for the amount of costs and expenses; that each bondholder should deliver his bonds to the trustee, and pay his proportionate share of the costs and expenses, and should share proportionately in the proceeds of any resale by the trustee. The trustee bid in the property, had the sale confirmed, and resold the property: Held, that bondholders who had delivered their bonds to the trustee, and had paid their share of the costs and expenses, had an equitable right to share in the proceeds of the resale, even though a majority of the bondholders had failed to deliver their bonds or pay their share of the costs and expenses.—INDIANA, I. & I. R. CO. v. SWANNELL, Ill., 41 N. E. Rep. 989.

109. TRUSTS—Charities. —A deed conveyed land in trust for the "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," an unincorporated association, and directed that the grantee should hold the land "for said widows and orphans of the members" of said brotherhood, under regulations made by it, "provided that the brotherhood may use the property or dispose of it for any charitable purpose, for the use of said widows and orphans:" Held, that the trust thereby created, being a charitable one, was not void for uncertainty.—GUILFOIL v. ARTHUR, Ill., 41 N. E. Rep. 1009.

110. VENDOR AND VENDEE—Sale of Land.—Where a contract for the purchase of land provides that, on performance of the contract by the vendee, the vendor will, on request and "surrender of the contract," execute a deed, an assignee of a mortgage given on the land by the vendee allowing the mortgagee at maturity to pay all liens on the land is entitled to a deed from the vendor on tender of any balance due on the price, without offering to surrender the contract.—CENTRAL PAC. R. CO. v. DEETZ, Cal., 42 Pac. Rep. 235.

111. VENDOR AND VENDEE—Sale of Land—Erroneous Boundaries.—Where a vendee of land has relied on the representations of the vendor as to the location of the boundaries of the tract, and such boundaries prove incorrect, and to inclose more land than is conveyed, the measure of damages available to the vendee in an action against him for the unpaid purchase money is the difference between the value of the land actually conveyed and of that inclosed by the boundaries pointed out by the vendor, without reference to the contract price.—KING v. BRESSIE, Tex., 32 S. W. Rep. 729.

112. VENUE—Change — Disqualification of Judge.—Code Civ. Proc. § 398, requiring a judge who is disqualified from acting in a cause to transfer it, if pending before him, to some other court, is not satisfied by calling to the court of the disqualified judge a judge who is not disqualified.—REMY v. OLDS, Cal., 42 Pac. Rep. 239.

113. WILL—Action for Construction.—The court will not construe the clause of a will devising certain real estate, in a suit brought for that purpose by an heir and devisee of the testatrix against the executor, as such, where it appears the latter has no interest whatever in the adjudication of the matter by the court, and that a judicial interpretation of the will could be of no aid or assistance to the executor in administering the estate.—KENNEDY v. MERRICK, Neb., 64 N. W. Rep. 960.

114. WILLS—Devise of Homestead.—A widow claiming the homestead under her husband's will with reference to debts takes as by purchase, and not under the statute.—NICHOLS v. LANCASTER, Ky., 32 S. W. Rep. 676.

115. WILL—Rule in Shelley's Case.—A testator devised land to his two daughters, "to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either [daughter] the surviving one to inherit the portion of the deceased sister, if she dies without issue:" Held, that under the rule in Shelley's Case the two daughters took an estate in fee. —SILVA v. HOPKINSON, Ill., 41 N. E. Rep. 1013.

116. WITNESS.—Under Rev. St. 1893, ch. 51, par. 5, § 5, which forbids husbands and wives to testify for or against each other, except in certain cases, when they "may testify for or against each other in the same manner as other parties may," a husband cannot testify for his wife, even in one of the specified cases, if they are both parties and there are adverse parties defending as representatives of a decedent; since in such case he could not testify even though his wife were not a party.—PYLE v. PYLE, Ill., 41 N. N. E. Rep. 999.

117. WITNESS — Payment to Deceased Administrator. —Section 5260, Comp. Laws, does not prohibit a party to an action from testifying in his own behalf to a personal transaction (in this case, payment) had with a deceased administrator, as against the successor of such deceased administrator, who sues to enforce, as part of the assets of the estate of the intestate, the claim which the party testifies he paid to the deceased administrator as administrator of the estate of such intestate.—ST. JOHN v. LOFLAND, N. Dak., 64 N. W. Rep. 930.

118. WITNESS — Transactions with Decedent.—Under Rev. St. § 8918, declaring that, in actions where one of the original parties to the "contract or cause of action in issue and on trial" is dead, the other party thereto cannot testify in his own favor, or that of any party to the action claiming under him, while a party to an action by heirs for partition cannot testify that money received by him from deceased was a gift, and not an advancement, he can testify to this effect in the case of money received by another party; these questions being separate issues, and independent of the general questions involved.—GUNN v. THURSTON, Mo., 32 S. W. Rep. 654.